

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1617

IN THE
United States Court of Appeals
For the Second Circuit

B

ESTATE OF DAVID SMITH, DECEASED, IRA M. LOWE,
CLEMENT GREENBERG, ROBERT MOTHERWELL, Co-executors,
Petitioners-Appellants,
against

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

On Appeal from the United States Tax Court

JOINT APPENDIX

SULLIVAN & CROMWELL
48 Wall Street
New York, New York 10005
and

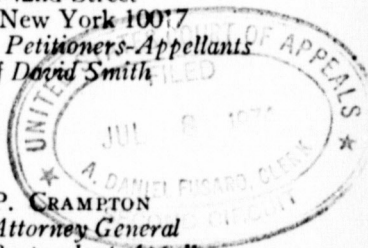
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Washington, D. C. 20530

MEYER ROTHWACKS
GEORGE WOLF
Of Counsel



PAGINATION AS IN ORIGINAL COPY

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Relevant Docket Entries

Docket No. 4251-69

DATE	FILINGS AND PROCEEDINGS
Aug. 21, 1969	Petition Filed: Fee Paid Aug. 1969.
Oct. 2, 1969	Answer filed by respondent.
Oct. 15, 1970	Motion by Petr. for leave to Amend Petition filed. (Amendment to Petition Lodged) Granted Oct. 20, 1970.
Oct. 20, 1970	Amendment to Petition Filed.
Oct. 26, 27, 1970	Trial at Washington, D.C. before Judge Kern. Record held open until Nov. 12, 1970 for supple- mental stipulation of facts. Resp's oral motion to quash subpoena—Granted. Stipulation of Facts with Ex 1A thru 7G attached. Original Briefs Due—Jan. 4, 1971 Reply Briefs Due—Feb. 3, 1971 Under Submission Judge Kern.
Nov. 10, 1970	Transcript of Oct. 26, 27, 1970 Washington, D.C. (2-Vols).
Dec. 8, 1970	Motion by Resp. for an additional extension of time to Jan. 11, 1971, in which to file Supplemental Stipulation of Facts, Granted Dec. 9, 1970.
Jan. 11, 1971	First Supplemental Stipulation of Facts filed.
Jan. 13, 1971	Motion by Resp. for leave to file out of time the Second Supplemental Stipulation of Facts. (Sec- ond Supplemental Stipulation of Facts Lodged). Granted Jan. 15, 1971.
Jan. 15, 1971	Second Supplemental Stipulation of Facts Filed.
Jan. 25, 1971	Third Supplemental Stipulation of Facts Filed. (OK)

Relevant Docket Entries

DATE	FILINGS AND PROCEEDINGS
Feb. 25, 1971	Motion by Petrs. for further hearing on the administration expense issue filed. Granted Mar. 22, 1971.
Feb. 26, 1971	Fourth Stipulation of Facts filed by the parties.
Mar. 12, 1971	Ordered that this case is reassigned from late Judge Kern to Judge Tietjens.
Mar. 23, 1971	Ordered petitioner's motion is granted and case will be placed at the foot of the calendar for the Motions Session April 21, 1971 Wash. D.C. for the purpose of taking testimony mentioned in petitioner's motion for further hearing.
Apr. 21, 1971	Hearing at Washington, D.C. before Judge Drennen. For the purpose of taking the testimony mentioned in Petr.'s motion for further hearing: <i>Submitted to Judge Tietjens</i> . Fifth Supplemental Stipulation of Facts filed.
Apr. 28, 1971	Transcript of April 21, 1971 received.
Jan. 7, 1972	Notice case reassigned to Judge Tannenwald.
Feb. 23, 1972	Findings of Fact and Opinion filed Judge Tannenwald. Decision will be entered under Rule 50.
Mar. 16, 1972	Joint Motion to revise opinion filed. Granted March 20, 1972.
Mar. 20, 1972	Ordered that the Findings of Fact and Opinion in the above-entitled proceeding filed on Feb. 23, 1972 be amended. Judge Tannenwald.
Jan. 11, 1974	Joint Motion to Revise Opinion. Granted Jan. 24, 1974.

Relevant Docket Entries

DATE	FILINGS AND PROCEEDINGS
Jan. 24, 1974	Order, that said motion is granted and the Court's Findings of Fact and Opinion in said case, filed Feb. 23, 1972 which was amended March 20, 1972, be further amended.
Jan. 11, 1974	Agreed Computation filed.
Jan. 30, 1974	Decision entered, Judge Tannenwald.

APPELLATE PROCEEDINGS

Apr. 19, 1974	Order fixing amount of bond at \$115,080.00 by informal request of petitioner.
Apr. 25, 1974	Surety bond in the amount of \$115,080.00, with Fireman's Fund Insurance Company of San Francisco, as surety, approved and ordered filed.
Apr. 25, 1974	Entry of Appearance by M. Bernard Aidinoff.
Apr. 25, 1974	Notice of Appeal to U.S.C.A., 2nd Circuit, filed by Petrs.
Apr. 26, 1974	Notice of Filing with copy of notice of appeal sent to Mr. Meade Whitaker, Chief Counsel.
Apr. 26, 1974	Notice, to parties, of assembling and date for transmission of the record.

Petition**TAX COURT OF THE UNITED STATES****[SAME TITLE]**

The above named petitioners hereby petition for a re-determination of the deficiency (bearing symbols AU:R: MW:gc) dated August 7, 1969, and as a basis of this proceeding, allege as follows:

1. The petitioners are the co-executors of the Estate of David Smith and their legal address in this capacity is c/o Ira M. Lowe, Co-Executor, 60 E. 42nd Street, New York, N.Y. 10017. The return was for the date of death of the decedent, May 23, 1965 and was filed with the District Director of Internal Revenue, Albany, New York, 12210.

2. The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A" was mailed to the petitioners on August 7, 1969.

3. The commissioner determined a deficiency in estate tax in the amount of \$2,444,629.17 all of which is in controversy. In addition, at the conclusion of the examination, an agreement was reached on the then proposed deficiency of \$46,449.67 and this amount plus interest was paid. That amount is also now in controversy. Therefore, the total amount in dispute is \$2,491,078.84.

4. The determination of tax set forth in said notice of deficiency as adjusted in item 3 above is based upon the following errors:

(a) The commissioner erred in determining that the petitioners returned value of \$714,000 for pieces of art by

Petition

the decedent is to be valued at \$5,256,918.00. The amount returned was based upon a qualified expert appraisal and the commissioner contends erroneously that the values are to be returned at retail value due to actual or prospective sales price after death.

(b) In determining a deficiency based upon the revenue agent's proposed adjustments, it was agreed, based solely on the expectation that the proposed adjustments would prevail, that items of \$60,000.00, \$20,000.00 and \$14,818.32 would be disallowed in the amount of \$76,224.67. The commissioner erred in not returning Form 890-B, Estate Tax Waiver in the amount of \$46,449.67 since he did not agree with the results thereof. The above disallowances were a part of the amount agreed to in such Form 890-B. These amounts were Executor's commissions, \$49,406.35; attorney fees, \$12,000.00; and miscellaneous administrative expenses, \$14,818.32 allowable either for estate tax or income tax but not for both.

(c) The commissioner erred in not allowing any credit for State death taxes as the amount previously allowed at the time of securing the Form 890-B, Estate Tax Waiver was allowed in the amount of \$28,597.95 as proved or allowable per allowance table. Based upon the increase in taxable estate per 890-B, additional State death taxes were paid so that the total paid, exclusive of interest was \$39,889.93 and interest of \$3,547.74 was charged and paid.

5. The facts upon which the petitioners rely as the basis of this case are as follows:

(a) The petitioners prepared and filed the estate tax return upon the basis of competent, expert, appraisal of the value of works of the decedent on hand at date of death.

(b) By letter dated July 8, 1968 (symbols ALB:AU:F:05JFR), Exhibit "B", a Form 890-B, Estate Tax Waiver

Petition

was submitted to the petitioners setting forth agreed upon results of an examination by Internal Revenue Agent, John F. Rausch. This letter proposed a deficiency of \$46,449.67 and was executed by the petitioners on the basis that this would be the tax result.

(c) The results were predicated in part upon Mr. Rausch's acceptance of an expert appraisal of the works of art of the decedent.

(d) As a corollary thereto and included in the results of the examination were certain items agreed to by the petitioners as being disallowed as they would deduct these items on a fiduciary income tax return.

(e) The deficiency agreed upon included the allowance of a credit for State death taxes in the amount of \$28,597.95.

(f) The determination of the commissioner set forth in Exhibit "A" attached hereto is arbitrary, discriminatory and capricious since under all circumstances, values at date of death and not subsequent values control the amount of taxable estate. Furthermore, Petitioners properly placed reliance on the agreement entered into between them and the agents and subsequently acted in accordance with this agreement. Any additional deficiencies and damages accruing from the later assessment of deficiencies amounts to a taking of Petitioner's property without due process. To compound the damages to Petitioners the respondent was dilatory in waiting until the approach of the Statute of Limitations period before springing the claim presently being contested. The determination is additionally erroneous since it fails to allow any credit for State death taxes when such item in the amount of \$28,597.95 was allowed in the previous agreement which was based upon the same law and regulations as currently in effect as to allowability. In letter of July 11, 1969 (symbols ALB:AU:F:05:JFR),

Petition

Exhibit "C", the agent states in the third sentence of the second paragraph of page 2 as follows: "This is done by increasing all items by six times from the returned value to put back in the blockage discount claimed and the selling commissions, this figure is then increased by 25% for all unsold items." It is completely out of all logic to say that (unless alternate value is elected) those items sold carry a lesser value than items unsold since this constitutes a contradiction by the commissioner of his own regulations which require a date of death value and the items unsold are therefore being valued at more than the other items sold closer to the date of death.

In arriving at the amount of the items in dispute, it is asserted that executors commissions of at least \$157,395.00 may be asserted; attorneys fees of at least \$52,465.00 and administration expenses of \$14,818.00 also will be assertable as the situation warrants.

WHEREFORE, the petitioners pray that the Court may hear the proceeding and:

1. Determine that the commissioner erred as alleged in each assignment of errors set forth in paragraph 4 hereinabove.
2. Find that there is no deficiency in the estate tax return for the date of death May 23, 1965 and
3. Give such other and further relief as in the premises the Court may deem fit and proper.

Ira M. Lowe
Attorney for the Estate of David Smith
60 E. 42nd Street
New York, N.Y.

(Verified August 21, 1969.)

**Exhibit A Annexed to Petition
Notice of Deficiency**


(See Opposite )

EXHIBIT A

161 Washington Ave., Albany, N.Y. 12210

US Treasury Department

District Director

Internal Revenue Service

Date:

AUG 7 1969

In reply refer to:

AU:R MM:cc



Estate of David Smith
Ira M. Lowe, Co-executor
2700 Q Street
Washington, D. C.

Dear Mr. Lowe:

In accordance with the provisions of existing Internal Revenue laws, notice is given that the determination of your estate tax liability for the above named decedent discloses a deficiency in the amount of \$2,444,629.17 as shown in the attached statement.

Address of Decedent: Bolton Landing, N. Y. Date of Death May 23, 1965

If you do not intend to contest this determination in the Tax Court of the United States, please sign the enclosed Waiver and return it promptly in the enclosed envelope. This will permit early assessment of the deficiency or deficiencies and limit accumulation of interest.

If you do not sign and return the Waiver, the deficiency or deficiencies will be assessed for collection, as required by law, upon the expiration of 90 days (150 days if you are outside the States of the Union and the District of Columbia) from the date of this letter, unless within that time you contest this determination in the Tax Court of the United States by filing a petition with that Court in accordance with its rules. A copy of the rules of the Court may be obtained by writing to the Clerk, Tax Court of the United States, Box 70, Washington, D. C. 20044.

Very truly yours,

~~Stephen G. Siskind~~
Commissioner

By *Donald T. Hartley*
District Director

Enclosures - 3:
Statement
Waiver 890
Return envelope

FORM 4059
(JANUARY 1964)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

STATUTORY NOTICE STATEMENT

SYMBOLS

1 of 5
AU:R MM:gc

Estate of David Smith
c/o Ira M. Lowe, Executor
2700 Q Street
Washington, D. C.

KIND OF TAX

Estate

~~WASSEEYARXES~~

DEFICIENCY

Date of Death

5/23/65

*\$2,444,629.17

*Of the gross deficiency of \$2,491,078.84, \$46,449.67 was previously agreed to as an additional deficiency and this amount was paid.

2.

FORM 3514 (TRANSLUCENT) (JULY 1963)	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE ESTATE TAX	AUDIT STATEMENT SCHEDULE 1
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NAME _____ 2 of 5

Estate of David Smith

TAXABLE ESTATE PREVIOUSLY DETERMINED IN PRELIMINARY LETTER STATEMENT DATED as returned - Form 706 \$ 710,682.05

INCREASES OR DECREASES TO TAXABLE ESTATE

Schedule F	\$4,543,805.28	
Schedule J	<u>76,224.67</u>	
Total increase		\$4,620,029.95
Less decrease to Schedule K.		<u>973.46</u>
Net increase to taxable estate		\$4,619,056.49

4,619,056.49

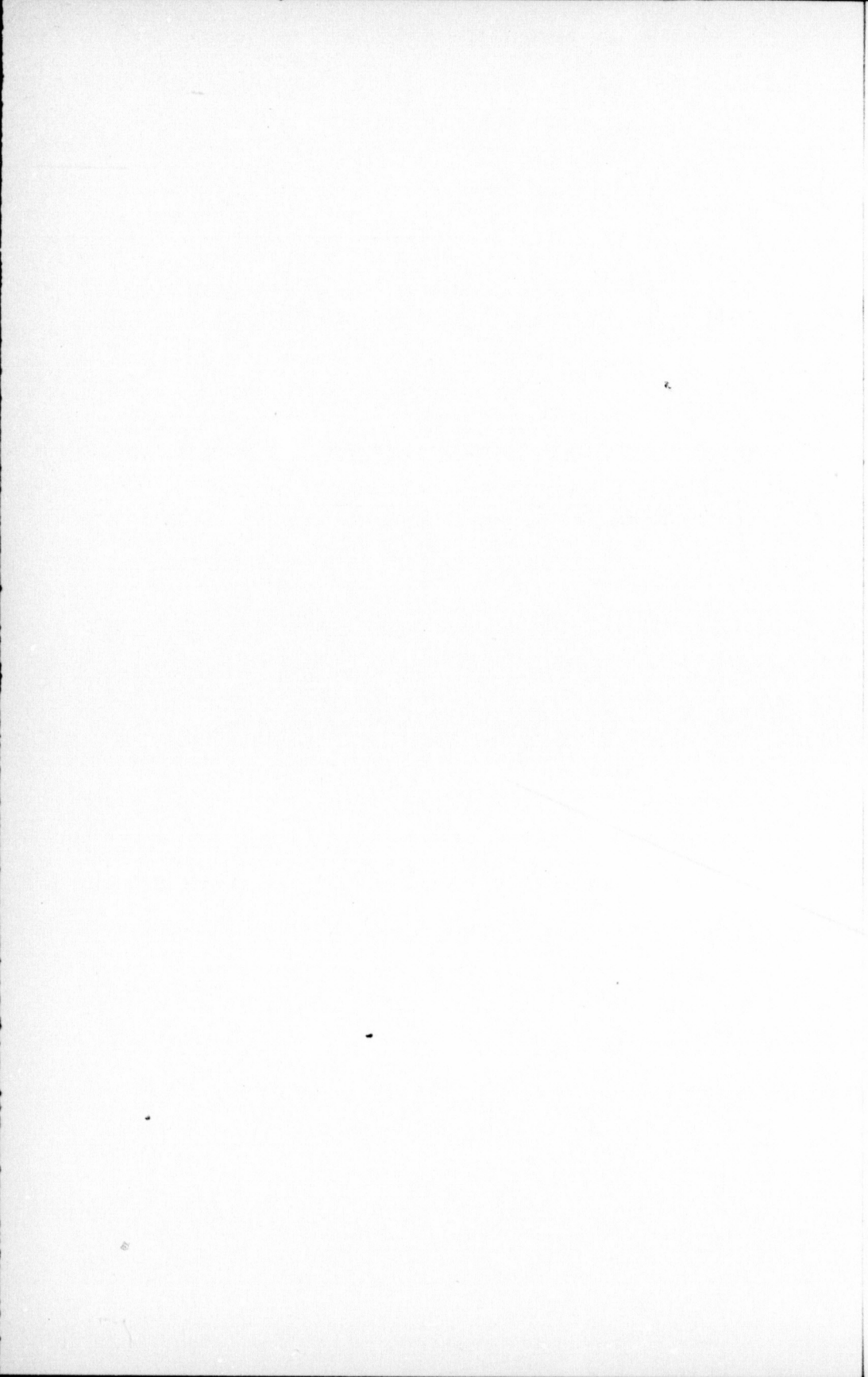
TAXABLE ESTATE AS REVISED

\$5,329,738.54

TAX COMPUTATION

GROSS ESTATE TAX		\$2,689,124.82
CREDIT FOR STATE DEATH TAXES SUBSTANTIATED		- 0 -
GROSS ESTATE TAX LESS CREDIT FOR STATE DEATH TAXES		\$ 2,689,124.82
CREDIT:		- 0 -
ESTATE TAX LIABILITY		\$ 2,689,124.82
ESTATE TAX ASSESSED:		
Per Return as filed DT 1212		198,045.98
GROSS DEFICIENCY (OVERASSESSMENT)		\$ 2,491,078.84
ADDITIONAL CREDIT FOR STATE DEATH TAXES ALLOWED		
Less Deficiency agreed to, assessed and paid		46,449.67
NET DEFICIENCY (OVERASSESSMENT)		\$2,444,629.17

[Pages 3, 4 & 5 omitted]



9a

Answer

TAX COURT OF THE UNITED STATES

[SAME TITLE]

THE RESPONDENT, in answer to the petition filed in the above-entitled case, admits and denies as follows:

1, 2 and 3. Admits the allegations of paragraphs 1, 2 and 3 of the petition.

4. (a), (b) and (c). Denies that the respondent erred as alleged in subparagraphs (a), (b) and (c) of paragraph 4 of the petition.

5. (a) through (f) and the unnumbered paragraph following subparagraph (f). Denies the allegations of subparagraphs (a) through (f) and the unnumbered paragraph following subparagraph (f) of paragraph 5 of the petition.

6. Denies generally each and every allegation of the petition not hereinbefore specifically admitted, qualified or denied.

WHEREFORE, it is prayed that the deficiency determined by the respondent be in all respects approved.

K. Martin Worthy,
Chief Counsel,
Internal Revenue Service.

Of Counsel:

Marvin E. Hagen,
Regional Counsel,
Rudolph J. Korbel,
Attorney,
Internal Revenue Service,
26 Federal Plaza (12th Floor),
New York, New York 10007.

Amendment to Petition

TAX COURT OF THE UNITED STATES

[SAME TITLE]

The Petitioners herein amend their Petition to specifically include relief more generally prayed for in the original Petition, as follows:

Petitioners pray that the commissions paid to the Marlborough Gallery be allowed as Administration expenses.

Ira M. Lowe
Attorney for the Estate of David Smith
60 E. 42nd Street
New York, N.Y.

Joint Stipulations of Facts**Stipulation of Facts****UNITED STATES TAX COURT****[SAME TITLE]**

The parties hereby stipulate and agree that for the purpose of this case the following facts and exhibits attached hereto and made a part hereof may be taken as true, subject to the rights of the parties to introduce other and further evidence not inconsistent with this stipulation and preserving to the parties the right to object, at the time of trial, to any and all portions of said stipulation and attached exhibits as they may deem to be irrelevant or immaterial.

1. Decedent, David Smith, died on May 23, 1965, in Albany, New York.

2. At the time of his death the decedent was a citizen and resident of the United States.

3. Decedent left a last will and testament dated January 21, 1965, which designated Robert Motherwell, Clement Greenberg, and Ira M. Lowe co-executors of the decedent's estate. Attached hereto as Joint Exhibit 1-A is a copy of decedent's last will and testament which has been filed with the Surrogate Court in Warren County, New York.

4. Petitioners, Robert Motherwell, Clement Greenberg, and Ira M. Lowe, filed a Federal estate tax return (Form 706) with the District Director, Albany, New York, on August 24, 1966. Attached hereto as Joint Exhibit 2-B is a copy of the original return. Also, attached as Joint Exhibit 3-C is the Inventory of David Smith as of May 23, 1965, which was filed as part of the Federal estate tax return. Petitioners elected date of death as valuation date for property reported on Form 706.

Joint Stipulations of Facts

5. On August 7, 1969, the respondent mailed to petitioner, Ira M. Lowe, the statutory notice upon which this proceeding is based. Attached hereto as Joint Exhibit 4-D is a copy of the statutory notice of deficiency.

6. The 425 pieces of metal sculpture were valued by the petitioners at \$714,000 on the Federal estate tax return. In the statutory notice of deficiency, respondent determined that the value of the 425 pieces of sculpture was \$5,256,918.00.

7. Attached hereto as Joint Exhibit 5-E is a copy of an affidavit executed by Stephen Weil on March 26, 1968, which explains how Mr. Weil arrived at the values reflected in Joint Exhibit 3-C of the 425 sculptures left by the late Mr. Smith.

8. Attached hereto as Joint Exhibit 6-F is a copy of a letter from Marlborough Galarie A.G. which explains the sales agreement in effect between Mr. Smith and Marlborough-Gerson at the time of David Smith's death.

9. Attached hereto as Joint Exhibit 7-G is a copy of a certificate of Payment of Tax, State of New York, Department of Taxation and Finance, dated August 4, 1969, showing that estate tax in the amount of \$39,889.93 has been paid by the Estate of David Smith to the State of New York.

10. In 1964 Cubi XI was sold to Morris Cafritz Company for \$30,000.00.

/s/ IRA M. LOWE

Ira M. Lowe
Counsel for Petitioners

/s/ K. MARTIN WORTHY—S.T.B.

K. Martin Worthy
Chief Counsel
Internal Revenue Service

*Joint Stipulations of Facts***First Supplemental Stipulation of Facts****UNITED STATES TAX COURT****[SAME TITLE]**

In accordance with the direction of this Court at the close of the trial of the above-captioned case on October 27, 1970, the parties hereby stipulate and agree that, for the purpose of this case, the following additional facts may be taken as true.

11. Sales commissions have been paid by the Estate of David Smith to Marlborough-Gerson Gallery in the amounts and during the periods as follows:

<i>Period</i>	<i>Sales Commissions Paid</i>
5/23/65- 5/31/66	\$ 52,599.67
6/ 1/66- 8/31/66	31,800.00
9/ 1/66-12/31/66	57,309.00
1/ 1/67- 3/31/67	57,349.00
4/ 1/67- 6/30/67	31,477.00
7/ 1/67- 9/30/67	65,567.00
10/ 1/67-12/31/67	32,375.00
1/ 1/68- 3/31/68	98,100.00
4/ 1/68- 6/30/68	150,567.00
7/ 1/68- 9/30/68	92,535.00
10/ 1/68-12/31/68	88,749.00
1/ 1/69- 3/31/69	106,442.00
3/ 1/69- 6/30/69	134,609.00
7/ 1/69- 9/30/69	20,666.00
10/ 1/69-12/31/69	123,483.00
1/ 1/70- 3/31/70	43,517.00

Joint Stipulations of Facts

12. All sales commissions reflected in paragraph 11 have been or will be deducted on Federal Fiduciary Income Tax Returns, Forms 1041, filed by the Estate of David Smith.

13. Co-executor Ira M. Lowe, who is also counsel for petitioners herein, would, if called upon, testify that, to the best of his personal knowledge and recollection and upon consultation with Mr. Frank Williams, accountant for the Estate of David Smith, the Estate has not filed a waiver pursuant to section 642(g) of the Internal Revenue Code of 1954.

14. Executors' commissions and legal expenses up to trial of this case and legal expenses covering the trial, pre-trial and post trial work shall be computed under Rule 50.

15. Sales commissions paid by the Estate to Marlborough-Gerson Gallery after March 31, 1970 will be included in the Rule 50 computation if the Court determines that sales commissions are deductible as administrative expenses.

/s/ IRA M. LOWE

Ira M. Lowe,
Counsel for Petitioners.

/s/ K. MARTIN WORTHY—STB

K. Martin Worthy
Chief Counsel,
Internal Revenue Service.

*Joint Stipulations of Facts***Second Supplemental Stipulation of Facts****UNITED STATES TAX COURT****[SAME TITLE]**

In order to clarify paragraph 13 of the First Stipulation of Facts, the parties hereby agree that, for purposes of this case, paragraph 13 should be deleted and the following paragraph substituted therefore.

16. Co-executor Ira M. Lowe, who is also counsel for petitioners herein, would, if called upon, testify that, to the best of his personal knowledge and recollection and upon consultation with Mr. Frank Williams, accountant for the Estate of David Smith, the Estate has filed no waiver with any Estate income tax return, or separately to be attached to any Estate income tax return, pursuant to section 642(g) of the Internal Revenue Code of 1954.

/s/ IRA M. LOWE

Ira M. Lowe,
Counsel for Petitioners.

/s/ K. MARTIN WORTHY—DWG

K. Martin Worthy
Chief Counsel,
Internal Revenue Service.

Joint Stipulations of Facts

Third Supplemental Stipulation of Facts

UNITED STATES TAX COURT

[SAME TITLE]

The parties hereby agree that for purposes of this case paragraph 12 of the first stipulation of facts should be deleted as erroneously entered into.

/s/ IRA M. LOWE

Ira M. Lowe,
Counsel for Petitioners.

/s/ K. MARTIN WORTHY—DWG

K. Martin Worthy
Chief Counsel,
Internal Revenue Service.

*Joint Stipulations of Facts***Fourth Stipulation of Facts**

UNITED STATES TAX COURT

[SAME TITLE]

The parties hereby stipulate and agree that, for purposes of determining the amount of sales commission deductible under section 2053 of the Internal Revenue Code of 1954 in this case, the following additional facts may be taken as true:

17. From date of death, May 23, 1965, through April 30, 1970 administration expenses, debts of decedent, taxes and other items totaling \$789,970.38 were paid by the estate.

18. In addition to the \$789,970.38 referred to in paragraph 17, from May 23, 1965 through April 30, 1970, \$55,937.75 was paid by the estate to Jean Smith for the support, education, and maintenance of Candida and Rebecca Smith, children of the decedent.

19. In addition to the \$55,937.75 referred to in paragraph 18, other amounts claimed by petitioners as distributions were paid to trusts created in accordance with decedent's will in amounts to be determined at a further hearing on the Administration Expense issue which will be requested by petitioners.

Respondent objects to the facts contained in paragraph 18 with respect to the \$55,937.75 paid for support of the decedent's children, and to paragraph 19 in its entirety on the grounds of relevancy and materiality.

20. Total cash of \$210,647.08 was available to the estate from sources other than the sale of sculptures to pay the said \$789,970.38 referred to in paragraph 17.

Joint Stipulations of Facts

21. Net cash of \$579,323.30 was required from sale of sculptures, to pay administration expenses, debts, taxes and other items referred to in paragraph 17 computed as follows:

Total payments made	\$789,970.38
Less: Cash available from other sources	<u>210,647.08</u>
Net cash required from sale of sculptures	\$579,323.30

22. The estate paid to Marlborough-Gerson Gallery commissions of $33\frac{1}{3}$ percent on each piece of sculpture sold; therefore, each gross sale of \$3.00 produced \$2.00.

23. Net commissions of \$289,661.65 paid to produce the \$579,323.30 cash referred to in paragraph 21 above, computed as follows:

$3/2 \times \$579,323.30$	=	\$868,984.95
$33\frac{1}{3}\% \times \$868,984.95$	=	289,661.65

24. Therefore, petitioners are entitled to deduct sales commissions of \$289,661.65 under section 2053 of the Code, plus any additional amounts that may be determined by this Court after a further hearing on the Administration Expense issue.

25. This stipulation is without prejudice to petitioner's right to claim additional deductions for amounts paid after April 30, 1970 as sales commissions, to be determined under Rule 50.

/s/ IRA M. LOWE

Ira M. Lowe,
Counsel for Petitioners.

/s/ K. MARTIN WORTHY—DWG

K. Martin Worthy
Chief Counsel,
Internal Revenue Service.

*Joint Stipulations of Facts***Fifth Supplemental Stipulation of Facts**

UNITED STATES TAX COURT

[SAME TITLE]

The parties hereby stipulate and agree that, for purposes of determining the amount of sales commission deductible under section 2053 of the Internal Revenue Code of 1954 in this case, the following additional facts may be taken as true:

26. Attached hereto as Joint Exhibit 19-S are certified copies of approved Accounts of Proceedings filed with the Surrogates Court of the County of Warren, New York, from May 23, 1965 to April 30, 1968 and from May 1, 1968 to April 30, 1970.

27. The items constituting the \$789,970.38 of administration expenses, debts of decedent, taxes and other items paid by the estate referred to in paragraphs 17, 18, 20 and 21 of the Fourth Supplemental Stipulation of Facts are itemized in Joint Exhibit 19-S.

28. In addition to the \$789,970.38 referred to in paragraph 27 above, \$55,937.75, referred to in paragraphs 18 and 19 of the Fourth Supplemental Stipulation of Facts, is reflected in Schedule E, Account of Proceedings from May 23, 1965 to April 30, 1968 as \$48,000 paid to Jean Smith for Candida and Rebecca and Miscellaneous payments of \$7,937.75 in Joint Exhibit 19-S.

29. In addition to the said \$789,970.38 and the \$55,937.75 referred to in paragraphs 27 and 28, supra, \$1,392,491.69 was paid by petitioners to trusts created in accordance with the decedent's will. This is the "other" amount mentioned

Joint Stipulations of Facts

in paragraph 19 of the Fourth Supplemental Stipulation of Facts. See Schedule E, Exhibit 19-S.

30. Attached hereto as Joint Exhibit 20-T is a copy of E.P.T.L., Section 11-1.1 with amendments, McKinney's Consolidated Laws of New York. The parties reserve the right to rely upon any other pertinent sections of the Laws of New York.

31. Attached hereto as Joint Exhibit 21-U is a copy of a Separation Agreement between David R. Smith and Jean F. Smith dated December 27, 1960. The parties agree that this document is to be admitted into evidence only if the petitioners subsequently produce a Degree of Divorce incorporating the terms of this Separation Agreement by reference. The parties further agree that this Separation Agreement standing alone does not substantiate the fact that any payments were made.

32. The decedent's children, Candida and Rebecca, were not claimed as dependents by the decedent on his income tax returns for the years 1963, 1964, and 1965.

/s/ IRA M. LOWE

Ira M. Lowe,
Counsel for Petitioners.

/s/ K. MARTIN WORTHY

K. Martin Worthy
Chief Counsel,
Internal Revenue Service.

Joint Exhibit 1-A to Stipulation of Facts
Last Will and Testament of David Smith

I, DAVID SMITH, residing at Bolton Landing, New York State, do hereby make, publish and declare this instrument of writing as and for my last will and testament, hereby revoking any and all former wills, testaments and codicils by me at any time heretofore made.

FIRST: I order and direct my Executors hereinafter named, to pay all of my just debts and funeral expenses as soon after my death as may be practicable. I also direct my Executors to pay all inheritance and estate taxes, and all other governmental charges, taxes or liens upon my estate passing under the terms of this my last will and testament (including those levied on policies of insurance on my life, and all property which may pass by reason of my death other than through my will whether or not the property, transfer or proceeds with respect to which said taxes are levied are a part of my estate at my death) or upon the interest of any of the legatees, devisees or beneficiaries therein, by any present or future laws of the United States or the State of New York relating to the transmission of property by descent or devise; and direct any transferee to reimburse my estate for said taxes so paid, nor shall they deduct the same from the share of any beneficiary hereunder. I further authorize my Executors to expend such sums as in their discretion may be deemed proper for my burial and interment, regardless of any limitation fixed by statute, rule of court, or otherwise.

SECOND: I hereby give, devise and bequeath all the remainder of my property including real and personal and all works of art including sculpture, paintings, drawings and any and all other forms of art of which I die possessed

Joint Exhibit 1-A to Stipulation of Facts

or which I may own or have any interest in at the time of my death to the Trustees, hereinbelow designated, IN TRUST NEVERTHELESS FOR THE FOLLOWING USES AND PURPOSES:

To divide the same into two separate and equal parts or shares, one for each of my children, Rebecca and Candida, and the Trustees shall hold one of the said parts or shares as a separate trust for each of said children.

The Trustees shall have the power to apply any part of the principal and income of the estate held in trust for each child to her support, education, and maintenance, at their discretion, and the unexpended part of such principal or income for each child shall be accumulated until the children respectively shall arrive at the age of 25 years, at which time the corpus of the trust shall be set over, assigned, and delivered to such child and the trust as to such child when she reaches the age of 25 shall thereupon cease and determine. If any child of mine shall survive me, but shall die while any portion of the estate remains undistributed, leaving issue of the body her surviving, the undistributed part of principal and income shall be held by the Trustees for the use and benefit of such issue, per stirpes, until the youngest of such issue shall arrive at the age of 25 years, at which time such share shall be distributed to and among the issue of such deceased child, and thereupon such trust for any grandchild or grandchildren shall cease and determine. During the infancy of such issue of either child of mine, and until distribution is made as aforesaid, my Trustees may apply the income, so far as necessary, to the support, education and maintenance of such issue.

If, however, one of my children shall survive me, but shall die without issue of the body, then the share of such deceased child shall be held in trust for my surviving child, and the income and principal thereof shall be applied and distributed in the same manner and at the same time as above set forth with respect to the surviving child's share.

Joint Exhibit 1-A to Stipulation of Facts

THIRD: My Executors and Trustees shall take possession of my estate and are hereby given power to hold, manage, operate, control, sell, convey, lease, mortgage, encumber, renew encumbrances, and assign the said estate, or any part thereof, to collect all the rents, income and profits therefrom; to pay all taxes, insurance charges, necessary repairs and other proper expenses connected therewith; and with full power to sell and convey, from time to time, and to mortgage and encumber such parts of my property and estate, real or personal, including all of my works of art, as in their best judgment and discretion may be expedient. The proceeds derived from any such sale or sales shall be invested and reinvested from time to time in such securities and property, real or personal, as my Trustees may elect.

In the disposal of my works of art and other property, real and personal, said Trustees shall have as full and unlimited power and discretion as if said trust property were their own absolute estate.

To determine all questions with respect to the manner in which expenses are to be borne and receipts are to be credited as between principal and income, and all decisions and accounts of the Executors and Trustees shall be binding on all persons in interest, and they shall incur no liability on account thereof unless guilty of fraud or willful negligence.

FOURTH: Having in mind the rule against perpetuities and laws imposing restraints on alienation and accumulations of income, each trust created by or under this will, except such trusts as have theretofore vested in compliance with such rule or laws, shall end, unless sooner terminated under other provisions hereof, twenty-one years from and after the death of the last survivor of such of the beneficiaries hereunder as are living at the time of my death,

Joint Exhibit 1-A to Stipulation of Facts

any provision of this will to the contrary notwithstanding, and thereupon the property held in trust shall be distributed, freed of all trusts, to the persons then entitled to share the income therefrom, in the proportion in which they are then entitled to share such income.

FIFTH: I direct that in the event that I and any legatee, devisee, beneficiary or remainderman under this last will and testament should die simultaneously, or as the result of a common disaster or accident, or under such circumstances as to render it difficult or impossible to determine whether or not such legatee, devisee, beneficiary, or remainderman has survived me, then and in any such event, my entire estate shall pass and be administered and disposed of in accordance with the provisions of this last will and testament as though such legatee, devisee, beneficiary or remainderman has survived me.

SIXTH: My Trustees are authorized to renew or extend the time of payment of any obligation, secured or unsecured, held or owed, for as long a period or periods of time and on such terms as they in their discretion may determine, and to adjust, settle, compromise or arbitrate all claims or demands upon such terms as they may deem advisable. They may also borrow money for such purposes as they may deem advisable.

SEVENTH: I hereby nominate, constitute, and appoint Robert Motherwell, Clement Greenberg, and Ira M. Lowe to be my Executors and Trustees under this Will and exempt each of them or any successive Executor or Trustee from giving any surety on his or their bonds. I direct that no action which may be required to be taken by my Executors or Trustees shall be taken except with the consent of the majority of my said Executors and Trustees.

Joint Exhibit 1-A to Stipulation of Facts

With regard to the disposition of my works of art, I request that my Executors and Trustees shall consult with and be advised by Helen Frankenthaler, Kenneth Noland, and Cornelia Noland.

IN WITNESS WHEREOF, I hereunto set my hand and seal this 21 day of January, 1965.

DAVID SMITH

(SEAL)

David Smith

This instrument consisting of six typewritten pages was by David Smith, on the date hereof, signed, published and declared by him to be his last will and testament, in our presence, who at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

name illegible

Name

Address

name illegible

Name

Address

name illegible

Name

Address

**Joint Exhibit 19-S to Fifth Supplemental
Stipulation of Facts**

**Decree of the New York Surrogate's Court
Approving First Intermediate Account of
Executors Dated October 11, 1968**

At a Surrogate's Court, Held in and for the
County of Warren, New York, at the Surro-
gate's Office in the Town of Queensbury, on
the 11th day of October 1968

Present,

HON. ALEXANDER P. ROBERTSON, Surrogate

IN THE MATTER OF THE
JUDICIAL SETTLEMENT OF THE ACCOUNTS
of
Ira M. Lowe, Clement Greenberg and
Robert Motherwell, as Executors
of the Estate of
DAVID SMITH,
Deceased.

Ira M. Lowe, Clement Greenberg and Robert Mother-
well, the executors of the estate of David Smith, late of
the Town of Bolton Landing in the County of Warren,
deceased, having heretofore presented to and duly filed,
with this Court their petition in writing, duly verified,
praying for a final judicial settlement of their intermediate

*Joint Exhibit 19-S to Fifth Supplemental
Stipulation of Facts*

accounts as such executors and a citation pursuant to statute citing and requiring all persons interested in the estate of said deceased as legatees, distributees, next of kin, creditors, bondsmen, or otherwise as appears from said petition, to be and appear in this Court on the day of
....., 19....., at 10:00 o'clock in the forenoon of that day, then and there to attend the final judicial settlement of the accounts of the said; and said citation having been duly returned on the said day named therein with satisfactory proof of the due service thereof, in the manner prescribed by law, upon all the persons named therein or by waivers of such persons, duly executed, same being all the persons interested in the said estate, and said citation and proofs of service and/or waivers having been duly filed in this Court; and the said executors having appeared in person and by Ira M. Lowe, Esq., their attorney. And it now appearing that Jean Smith duly appointed Guardian of Rebecca Smith and Candida Smith, minors,, Esq., of was duly appointed special guardian to appear for said minors and he duly appeared as such, and the transfer tax on said estate, if any, heretofore assessed fixed and determined by the Surrogate, having been paid, as appears from the proper receipt therefor heretofore filed, or a decree of exemption from transfer tax; and the said executors having rendered and filed their account, under oath, before the said Surrogate, together with the vouchers in support of the same; and no objection to the same having been made:
..... and the said Surrogate, having examined the said account and vouchers; and having heard the proofs and allegations of the parties in regard to the same, and mature deliberations being had thereon, now, here, makes, finds and records the state and condition of said account to be stated and set fourth in the following Summary Statement thereof, made

*Joint Exhibit 19-S to Fifth Supplemental
Stipulation of Facts*

by the said Surrogate as finally and judicially settled, allowed and adjusted by him hereby recorded with and taken to be a part of this decree:

A Summary Statement of the Accounts of Ira M. Lowe, Clement Greenberg and Robert Motherwell as the executors of the estate of David Smith deceased, as finally settled, allowed and adjusted.

The executors charged as follows:

CHARGES

Amount shown by Schedule "A"	
(Principal received)	\$ 997,961.55
Amount shown by Schedule "A-1"	
(Realized Increases on principal)	\$ 776,593.27
Amount shown by Schedule "A-2"	
(Income Collected)	\$ 13,121.22
TOTAL CHARGES	\$1,787,676.04

CREDITS:

Amount shown by Schedule "B"	
(Realized decreases on principal)	\$ 764.22
Amount shown by Schedule "C"	
(Funeral and Administration expenses)	\$ 337,858.95
Amount shown by Schedule "D"	
(Creditors' claims actually paid)	\$ 73,595.67
Amount shown by Schedule "E"	
(Distributions to legatees, distributees, etc.)	\$ 280,937.75
TOTAL CREDITS	\$ 693,156.59
Balance on hand shown by Schedule "F"	\$1,094,519.45

And it appearing that the said executors have fully accounted for all the moneys and property of the said estate of the said decedent that have come into their hands as such, as stated in their intermediate account and that they have not made any profit from any increase thereof; and said accounts having been adjusted

*Joint Exhibit 19-S to Fifth Supplemental
Stipulation of Facts*

by the said Surrogate and a Summary Statement of the same having been made and herewith recorded as above

IT IS ORDERED, ADJUDGED AND DECREED That the said Accounts be, and the same hereby are finally and judicially settled and allowed as filed and adjusted by the said Surrogate in accordance with said Summary Statement.

And it is further Ordered and Decreed that out of the balance so found, as above remaining in the hands of the said executors they retain for the commissions to which they are entitled on this accounting the sum of \$62,873 and 43 Cents (\$62,873.43); and .he. retain for costs and disbursements in this accounting the sum of Dollars (.....).

Commissions are computed as follows:

	<i>Amount</i>	<i>Commis- sions per each executor</i>
At 4 per cent (Not exceeding \$10,000.00)	\$ 10,000.00	\$ 400.00
At 2½ per cent (Not exceed- ing next \$290,000.00)	\$ 290,000.00	\$ 7,250.00
At 2 per cent (Over \$300,000.00)	\$1,415,390.60	\$28,307.81
Totals	\$1,715,390.60	\$35,957.81

Final distributions will be made when final account is submitted and approved and it is ORDERED AND DECREED that the Intermediate Account as submitted is approved by this court.

ALEXANDER P. ROBERTSON
Surrogate

*Joint Exhibit 19-S to Fifth Supplemental
Stipulation of Facts*

**Decree of New York Surrogate's Court
Approving Second Intermediate Account
of Executors Dated August 6, 1970**

At a Surrogate's Court, Held in and for the
County of Warren, New York, at the Surro-
gate's Office in the Town of Queensbury, on
the 6th day of August 1970

Present,

HON. ALEXANDER P. ROBERTSON, Surrogate

IN THE MATTER OF THE
JUDICIAL SETTLEMENT OF THE ACCOUNTS
OF
Ira M. Lowe, Clement Greenberg and
Robert Motherwell, as Executors
of the Estate of
David Smith
Deceased.

Ira M. Lowe, Clement Greenberg and Robert Mother-
well, the executors of the estate of David Smith, late of
the Town of Bolton Landing in the County of Warren, de-
ceased, having heretofore presented to and duly filed, with
this Court their petition in writing, duly verified, praying
for a final judicial settlement of their 2nd intermediate

*Joint Exhibit 19-S to Fifth Supplemental
Stipulation of Facts*

accounts as such executors and a citation pursuant to statute citing and requiring all persons interested in the estate of said deceased as legatees, distributees, next of kin, creditors, bondsmen, or otherwise as appears from said petition, to be and appear in this Court on the day of, 19, at 10:00 o'clock in the forenoon of that day, then and there to attend the final judicial settlement of the accounts of said executors; and said citation having been duly returned on the said day named therein with satisfactory proof of due service thereof, in the manner prescribed by law, upon all the persons named therein or by waivers of such persons, duly executed, same being all the persons interested in the said estate, and said citation and proofs of service and/or waivers having been duly filed in this Court; and the said executors having appeared in person and by Ira M. Lowe, Esq., their attorney. And it now appearing that Jean Freas Pond (formerly Jean Freas Smith) mother and duly appointed guardian of Rebecca Smith and Candida Smith, minors,, Esq., of was duly appointed special guardian to appear for said minors and he duly appeared as such, and the transfer tax on said estate, if any, heretofore assessed fixed and determined by the Surrogate, having been paid, as appears from the proper receipt therefor heretofore filed, or a decree of exemption from transfer tax; and the said executors having rendered and filed their account, under oath, before the said Surrogate, together with the vouchers in support of the same; and no objection to the same having been made: and the said Surrogate, having examined the said account and vouchers; and having heard the proofs and allegations of the parties in regard to the same, and mature deliberations being had thereon, now, here, makes, finds and records the

*Joint Exhibit 19-S to Fifth Supplemental
Stipulation of Facts*

state and condition of said account to be stated and set forth in the following Summary Statement thereof, made by the said Surrogate as finally and judicially settled, allowed and adjusted by him hereby recorded with and taken to be a part of this decree:

A Summary Statement of the Accounts of Ira M. Lowe, Clement Greenberg and Robert Motherwell as the executors of the estate of David Smith deceased, as finally settled, allowed and adjusted.

The executors charged as follows:

CHARGES

Amount shown by Schedule "A"	
(Principal received)	\$1,107,894.45
Amount shown by Schedule "A-1"	
(Realized Increases on principal)	\$1,564,800.50
Amount shown by Schedule "A-2"	
(Income Collected)	\$ 63,781.07
TOTAL CHARGES	\$2,736,476.02

CREDITS:

Amount shown by Schedule "B"	
(Realized decreases on principal)	\$ 1,945.10
Amount shown by Schedule "C"	
(Funeral and Administration expenses)	\$ 358,910.52
Amount shown by Schedule "D"	
(Creditors' claims actually paid)	\$
Amount shown by Schedule "E"	
(Distribution to legatees, distributees, etc.)	\$1,172,106.69
TOTAL CREDITS	\$1,532,962.31
Balance on hand shown by Schedule "F"	\$1,203,513.71

And it appearing that the said executors have fully accounted for all the moneys and property of the said estate of the said decedent that have come into their hands as such, as stated in their intermediate account and that they have not made any profit from any increase thereof; and

*Joint Exhibit 19-S to Fifth Supplemental
Stipulation of Facts*

..... said accounts having been adjusted by the said Surrogate and a Summary Statement of the same having been made and herewith recorded as above

IT IS ORDERED, ADJUDGED AND DECREED That the said Accounts be, and the same hereby are finally and judicially settled and allowed as filed and adjusted by the said Surrogate in accordance with said Summary Statement.

And it is further Ordered and Decreed that out of the balance so found, as above remaining in the hands of the said executors they retain for the commissions to which they are entitled on this accounting the sum of \$92,439 and 83 Cents (\$92,439.83); and they retain for costs and disbursements in this accounting the sum of Dollars (.....).

Commissions are computed as follows:

SEE SCHEDULE ATTACHED

	<i>Amount</i>	<i>Commis- sions per each executor</i>
At 4 per cent (Not exceeding \$10,000.00)	\$.....	\$.....
At 2½ per cent (Not exceed- ing next \$290,000.00)	\$.....	\$.....
At 2 per cent (Over \$300,000.00)	\$.....	\$.....
Totals	\$.....	\$.....

*Joint Exhibit 19-S to Fifth Supplemental
Stipulation of Facts*

ESTATE OF DAVID SMITH

SCHEDULE I, STATEMENT OF COMPUTATION OF COMMISSIONS

On amounts received:

Amounts per Schedule A over previous accounting	\$ 13,375.00	
Less: Increases in Schedule A from realty	2,750.00	
	<hr/>	
Increase in Schedule A		\$ 10,625.00
Amount per Schedule A-1	1,564,800.50	
Less: Amount per Schedule B	1,945.10	1,562,855.40
	<hr/>	
Adjusted basis for receiving commissions		<u><u>\$1,573,480.40</u></u>

On amounts paid out:

Total credits per this accounting	1,532,962.31	
Less: Amount per Schedule B	1,945.10	
	<hr/>	
Adjusted basis for paying commissions		<u><u>\$1,531,017.21</u></u>

	<i>Receiving</i>	<i>Paying</i>	<i>Total</i>
$\$1,573,480.40 \times 2\% \times \frac{1}{2}$	\$15,734.80		15,734.80
$\$1,531,017.21 \times 2\% \times \frac{1}{2}$		15,310.17	15,310.17
	<hr/>	<hr/>	<hr/>
Total one commissions	\$15,734.80	15,310.17	\$ 31,044.97
	<hr/>	<hr/>	<hr/>
3 commissions payable	<u><u>\$47,204.40</u></u>	<u><u>45,930.51</u></u>	<u><u>\$ 93,134.91</u></u>

RECEIVING COMMISSIONS ON INCOME

	<i>Amount Per Schedule A-2</i>	<i>Amount</i>
Accounting as of April 30, 1968	$\$13,121.22 \times 2\% \times \frac{1}{2}$	131.22
Accounting as of April 30, 1970	$63,781.07 \times 2\% \times \frac{1}{2}$	637.81
	<hr/>	<hr/>
Total	\$76,902.29	\$ 769.03
	<hr/>	<hr/>
Total for three executors		<u><u>\$ 2,307.09</u></u>

*Joint Exhibit 19-S to Fifth Supplemental
Stipulation of Facts*

Less :

Paying commissions on loans collateralized by stock, per accounting as of April 30, 1968	<i>Amount</i> \$33,500.00 x 2% x 1/2	\$ 335.00
Total for three executors		<u>\$ 1,005.00</u>
Principal commissions per this accounting		93,134.91
Income commissions per accounting as of April 30, 1968; April 30, 1970		<u>2,307.09</u>
Sub-total		95,442.00
Less: Paying commissions on loans collateralized by stock, per accounting as of April 30, 1968		<u>1,005.00</u>
Total commissions payable, this accounting		94,437.00
Less: Commissions paid for this accounting per Schedule C-1		<u>1,997.17</u>
Commissions due and payable this accounting		<u>\$ 92,439.83</u>
The above amount \$92,439.83 is due and payable at this accounting.		
The amount of estimated principal commissions to which the balance on hand of \$1,203,513.71 is subject is as follows:		
Principal commissions this accounting		\$ 93,134.91
Less: Amount of paying commissions on loans collateralized by stock per accounting as of April 30, 1968		<u>1,005.00</u>
Balance		92,129.91
Less: Amounts paid previously—see Schedule C-1		<u>1,997.17</u>
Principal commissions		<u>\$ 90,132.74</u>

Final distributions will be made when final account is submitted and approved and it is ORDERED AND DECREED that the Intermediate Account as submitted is approved by this court.

ALEXANDER P. ROBERTSON
Surrogate

**Excerpts from Transcript of Proceedings Before
Tax Court, October 26-7, 1970**

UNITED STATES TAX COURT

[SAME TITLE]

Courtroom No. 2
Internal Revenue Building
Washington, D. C.
October 26, 1970

Before:

JOHN W. KERN, Judge

Appearances:

Ira M. Lowe, Esq., For the Petitioners

St. Clair Reeves, Esq., For the Respondent

• • •

(18) EUGENE V. THAW, a private art dealer with an office at 525 Park Avenue, New York, New York, and the President of the Art Dealers Association of America, called as a witness by the respondent, having been first duly sworn, testified as follows:

Direct examination by Mr. Reeves:

* * *

(36) Q. Do you understand that formula? A. I understand the mathematics of it, I don't understand the reasoning—

Q. The mathematics is all I'm inquiring about at this time. A. Yes.

Eugene V. Thaw, for Respondent—Direct

Q. I'm going to hand you now Exhibit 3C an inventory of the sculptures of David Smith as of May 23, 1965. Did you ever see a copy of that before? A. Yes, I have.

Q. What does that document purport to be? A. It purports to be a list of the values of every individual piece in the total inventory according to the formula set forth in the previous document. Namely one-sixth of the price of the piece is the actual value at the time of death.

The Court: Both of these documents are in evidence?

Mr. Reeves: Yes, sir, they are in evidence.

A. It's approximately one-sixth, I'm not sure it's exactly. Yes, it says one-sixth.

Q. In other words, if you wanted to determine the fair market value before any discounts—turn to page 14.

The Court: Bear in mind, these are in evidence. You can comment on them.

Q. The first item there says, 'what is the value placed (37) on it in the right-hand column,' the first item on the page? A. \$1,000.

Q. Based on this formula, before any discounts were made, what would this indicate that the market value was before any discount was placed? A. \$6,000.

Mr. Lowe: Your Honor, may I make an objection?

The Court: Yes.

Mr. Lowe: Why is this witness called upon to testify with regard to what's in the exhibit. The exhibit is in evidence?

Mr. Reeves: I want to be sure, Your Honor, that the Court understood that our witness under-

Eugene V. Thaw, for Respondent—Direct

stood how these values were arrived at, in their inventory.

A. I understand it. You multiply by 6 to get—

Mr. Lowe: Excuse me, there's no question pending, Your Honor.

The Court: Go ahead.

Q. On the basis of your knowledge of Mr. Smith's art work, what is your opinion of the values placed on these individual objects of art shown in Exhibit 3C as of May 23, 1965, before any deductions for selling prices were deducted by executors of the estate? In other words, if you multiply these by the sixth, what is your opinion of the value of the individual pieces?

(38) Mr. Lowe: I have an objection, Your Honor. As I understand an expert witness would be called to testify as to what he believes the valuation was as of the date of death, and not merely to comment on something that is already in evidence.

The Court: I think it will be perfectly proper for him to say as an expert what he thinks about the method of valuation as used by somebody else if it differs from his.

(To Mr. Reeves) Are you going to ask this witness what his opinion is as to the value?

Mr. Reeves: Yes, sir. I certainly am.

The Court: Well, go ahead and ask him, then.

Mr. Reeves: It's not really quite that simple, Your Honor, but I'll get into that.

By Mr. Reeves:

Q. Mr. Thaw, in your opinion were some of Mr. Smith's sculptures more valuable than others? A. Yes, indeed. Of course they were.

Eugene V. Thaw, for Respondent—Direct

Q. Which were the most valuable? A. In general the works at the very end of his life. The last pieces. And certainly the pieces from 1950 to the end of his life constitute a body of work that were the valuable things, the most valuable things in esteem, in the esteem of buyers.

(39) Q. Do you have any idea as to what percentage of the sculptures were created after 1950? A. I haven't got an exact percentage. One could do it on an adding machine, but there would certainly be overwhelming numbers of sculptures on the list that you showed me are works after 1950. I would say much more than two-thirds of the total came in the period that I consider his most valuable works.

Q. Mr. Thaw, if Mr. Smith's executors had sought your advice on May 23, 1965, how would you have recommended that they market the 425 sculptures to attain the highest possible price in the shortest time.

Mr. Lowe: Your Honor, I'm going to object to the form of that question.

The Court: What is this, a kind of blockage approach?

Mr. Reeves: Your Honor, they took a blockage approach, but the purpose of this question is to show that the method that they took is not in accord with the code and regulation.

The Court: I'll overrule the objection. He can testify.

What in your opinion as an expert was the most advantageous method of marketing these sculptures?

The Witness: The most advantageous, Your Honor, meaning in terms of getting the highest return?

(40) The Court: Yes. The best way to liquidate, yes.

Eugene V. Thaw, for Respondent—Direct

The Witness: I would say the way that they chose was the best way. To choose a major art firm and to liquidate them slowly over a period of years, holding back as much as they could and selling in a regular, orderly manner.

Q. In your professional opinion, what is the maximum amount of time from the date of Mr. Smith's death, do you think it would have taken to sell substantially, I'm talking about 90 to 95 percent of all of the 425 sculptures, item by item? A. If you control the market, you can do it at any speed you want, but I would say that it would take just to take a figure that it would take up to ten years to sell the bulk of the work without ruining the market by dumping.

Q. Let's assume that these articles were sold over a ten-year period, in your opinion would they have been sold in equal amounts over, whatever period you take, ten, five, fifteen, whatever, would they have been sold in your opinion in equal amounts over the ten-year period? A. I don't think so. These things go in waves depending on all kinds of factors. There would have been probably a greater surge immediately after his death and then it would have probably tapered off toward the end of that period. But other factors could have changed that.

(41) Q. Do you think that the more valuable pieces would have sold first or last? A. Unless artificially held back, the most important pieces would have probably sold first.

Q. So in the ten-year period, you would think—

The Court: Just a moment, may I ask the witness, the witness said unless they were artificially held back, but I understood that your testimony was to the effect that there should be an artificial

Eugene V. Thaw, for Respondent—Direct

holding back in order to accomplish the most advantageous liquidation.

The Witness: I think that's true, Your Honor. I think that a good dealer would control the supply carefully and would not release all the good pieces immediately.

Q. In other words, in this ten-year period, are you saying that he would have gotten a greater share of the income in the early years? A. I didn't say he would have. He could have.

Q. Could have. A. Could have, yes.

Q. Is there any other method of selling these objects that could have been used besides the item by item method? A. Yes.

Q. Would you name it? A. There are several other methods. At least two other well-recognized methods. You can make an auction or (42) a series of auctions of an artist's property left at death and the most famous case of that was the Corot sale. The sale of Corot's studios at the time of his death, which was a landmark sale. And the other method—

Q. Just a moment. In the auction method, let's assume that at a reasonable time after death, the executors had placed these items on the market at an auction, one big auction, in your professional opinion, how much do you think the entire collection would have brought? A. I thought this over very, very carefully and in view of the demand for this artist's work that I consider existent at the time of his death, a properly conducted auction would have brought reasonably close to the figures given on this inventory, of six times the listed values. In other words, they would have brought reasonably close to the so-called retail value at that time. I think it would have been a question, to qualify my answer, it would have been a world

Eugene V. Thaw, for Respondent—Direct

event in the history of art and people from all over the world, museums, collectors, would have felt it was the last chance, a once in a lifetime opportunity and it would have been an event of major proportions.

I grant that's speculation, but that's what I think would have happened.

Q. In other words, you think that they would have brought six times the \$714,000— (43) A. One can't give exact figures.

Q. I mean— A. It would have brought approximately range of that—of those prices.

Q. Is the auction method of disposing of collections like this used often in the United States? A. Very seldom.

Q. In Europe? A. Quite often.

Q. What other method could have been used to dispose of these 425 sculptures? A. A wealthy individual art firm or an art firm with backers, or a combination of art firms could have made a bid for the entire inventory and in fact purchased the estate and then used its own good judgment and own devices to sell it over a period of years and liquidate it at their own pace.

Q. Have you ever known a large collection to be sold in this manner? A. Yes. The most famous artist whose estate was handled in this manner was Bonnard. That was sold to a great art firm called Wildenstein, with the participation of two other parties in minority interest in the estate and that has been successfully and is continuing to be and will continue to be for any number of years disposed (44) of at their pace.

Q. Where is Wildenstein located? A. I believe it's 14 East 64th Street, I'm not sure—It's East 64th Street. I'm not sure whether it's 12 or 14.

Q. In New York City? A. In New York City, but they have branches in other cities of the world.

Eugene V. Thaw, for Respondent—Direct

Q. When did they buy this Pierre Bonnard collection?

A. Negotiations were protracted, but to the best of my recollection, the deal was completed in '62 or '63.

Q. Mr. Thaw, if a bulk sale of the entire Smith collection had been proposed at the time of Mr. Smith's death, would you have participated in the purchase of the entire collection with a syndicate of dealers, or a loan of outside financial interest? A. Eagerly.

Q. At what price would you have been willing to participate in the purchase of this entire collection? What would you have offered? A. From the study of this inventory, from a careful study of this inventory, I would have been prepared to form a syndicate or participate in a syndicate to offer approximately two million dollars for the entire inventory.

Q. And you would—would you have expected to make a profit? (45) A. Indeed I would.

Q. Would this two million dollar offer include all discounts, selling commissions, costs of insurance and transportation, you would have borne all of these expenses yourself, is this true or false? A. That would have on top of the two million dollars. I would have been prepared, as I said, to pay or to get a syndicate together to pay two million dollars for what's on this list, with no other additions.

Q. Would you tell the Court what factors you would consider that you considered at the time of death why you would have been willing to pay two million dollars for this estate? Just what factors you base this judgment on?

A. It was quite clear, I think, to almost everyone in the American art world and the world art world at the time of Smith's death that he was the major sculptor in the world at that time. And having been a man who disliked selling, he withheld meeting the demand for his work by releasing the bulk of his sculptures in his lifetime, so there

Eugene V. Thaw, for Respondent—Cross

was an enormous pent-up demand on the part of museums and collectors for his work, and I felt that the critical reputation of the artist, the overwhelming belief with almost no dissenting voice that he was a major figure in the history of art.

Plus the fact that the amount of work available for sale before his death was minimal.

* * *

(48) Q. This is an opinion. In your opinion, is it true that most artists' works increase in value after they are dead? (49) A. It's not necessarily true, no. Some artists increase, and some artists stay the same and some artists go down.

Q. Could you name some artists whose works decreased after they were dead? A. The most notable recent case was Hans Hoffman, a famous American artist who lost his dealer just before, or changed dealers or left his dealer just before his death. And his work dropped in value for a period of time after his death. It has since recovered, but it dropped. And a French artist called Dufy, Raoul Dufy, dropped appreciably after his death. It depends on a lot of factors and on the critical esteem and the way it's handled.

Mr. Reeves: No further questions, Your Honor.

Cross-examination by Mr. Lowe:

Q. So that, Mr. Thaw, the critical esteem and the way it's handled is certainly not known until some time after death, isn't that correct? A. No that's not correct.

Q. You know the day of death, you are able to tell what the critical esteem is? A. You can tell what the critical esteem has been up to the date of death. The critical esteem is a continuing process.

* * *

Eugene V. Thaw, for Respondent—Cross

Robert Motherwell, for Petitioners—Direct

(79) Q. So if your understanding was not correct, then your whole testimony would be different, wouldn't it?

A. No, my testimony wouldn't change at all. I would still feel—

Q. Would you have come up with those exact figures, for May or shortly thereafter, of 1965, that the executors came up with? A. No.

Q. What figures would you have come up with? A. Slightly higher figures, 20 or 25 percent higher figures according to my views expressed on the panel.

Q. Then those views are in the minutes of the meeting that we are talking about, is that correct? A. I would assume so. I've never seen any minutes, so I don't know. But I would assume, if there are minutes my views are in there.

Q. You know there was a stenographer present taking the minutes. A. Not a stenographer.

Q. Would you tell us who was taking the minutes? A. We have a discussion, an informal discussion. At the end of the discussion, a summary is made of the views.

Q. Who makes the summary? A. Mr. Ruhe makes the summary and repeats it to a secretary who writes down the conclusions. * * *

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(94) ROBERT MOTHERWELL, residing at 173 East 94th Street, New York City, an artist, a counselor to the Smithsonian Institute, art editor of Viking Press, and an executor of the Estate of David Smith, called as a witness by the petitioners, having been first duly sworn, testified as follows:

Direct examination by Mr. Lowe:

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Robert Motherwell, for Petitioners—Direct

(96) Q. Has there come a time when you considered this entire question of value and marketability of artists' own work after death, and come up with some other methods of valuation? A. I think any procedure would be arbitrary.

Q. Do you know that it is possible to determine a specific evaluation for an artist based on the date of death, based on the unknown factors that exist at the time? A. No, because when you use the word market you are implying that there is a commodity such as an automobile that is a general necessity and may sell at a little more or a little less. It is something that is essential to everyday human existence and therefore has some kind of market.

In the case of an expression of the human spirit, nobody has to have it and the more particular or specialized that expression is, the less likely there will be a number (97) of people appreciative of it, and even less likely that of those people who are appreciative there will be people with money.

Q. Do artists produce, either painting or sculpture, because of the demand or because of the market, or because of some other reason? A. I would say basically it is such a painful process that one would only spend a lifetime at it if one had to do it unless one were making a specific commodity for a specific market, such as a commercial artist. In the case of a fine artist, no.

Q. What are some of the vagaries of the art market that determine whether or not an artist will or will not sell after his death? A. It is subject to all kinds of things, general economic conditions, particularly taste in prevailing styles, but also to sophistication. For example in the case of Cezanne who many people regard now as perhaps the greatest artist of the nineteenth century and who was born and lived nearly all of his life in a town in France called Aiks, when he was dying he called the curator of the local museum and said that he would like to leave a

Robert Motherwell, for Petitioners—Direct

few pictures to the museum and the curator very politely replied that the museum did not accept the work of amateurs.

Q. I think that makes the point.

(98) Can you give us other examples of how prices sharply rise and also how they sharply fall? A. In the, I believe, nineteenth century the Rembrandts brought very small prices. I believe El Greco's brought almost nothing. I myself in 1940 bought a Pecavio (phonetic) which I imagine is worth \$10 or \$15,000 now for \$35 because nobody wanted it.

But I should also emphasize that in the sense I'm talking about there's no market. I have also bought a Japanese painting, a seventeenth century through an exchange of three paintings that have a much greater market value than the Japanese painting has or ever will have, but I wanted that particular painting, because I love that painting more than any painting in the world. And the real buyer for a really refined artist is not a speculator as in the stock markets for the most part, but somebody who loves that object and in that sense it's love plus what money he has available that establishes in some surrealist way whatever the market is.

Q. Would what you have been saying have any particular application to the abstract, contemporary modern art of David Smith? A. Yes. If one has to generalize, there's no question that people in general are most interested in art to the degree that it's representational, to the degree that it (99) tells a story, to the degree that it can be filled with associations.

Abstract art, of which both David and I were representatives, is an art without any illustration, without any representation in that sense. Consequently for most people it is the most difficult, the most meaningless, they are apt to say a child can do that in kindergarten or whatever. So to find somebody who understands the inner spiritual

Robert Motherwell, for Petitioners—Direct

quality of it and it becomes a very few number of people. And if the prices are at all respectable the number of people who have that awareness who also have the money are infinitesimal at a given moment.

Q. Could you tell us approximately when the interest in contemporary modern art first manifest, and I am talking about the present interest, how many years back has it been that there has been some real concern, some real interest? A. I imagine by modern art you mean abstract art—

Q. I mean American art. American contemporary. A. With very few exceptions, there was a prejudice throughout the world that the masters of such art were Europeans. So that in the 40's and 50's, there was a savage struggle on the part of American artists to establish themselves as the equals of their European compeers, which also involved an American civil war in that most American artists were not abstract artists, so that it was to the advantage (100) of all of those artists to put down American abstract art as well as all the people who were addicted to the European versions of it. And David Smith was certainly one of the heroes of this struggle that has left most of the people in this struggle dead, mostly through violence.

Q. In this struggle, could you tell us from your own personal knowledge about the desire or lack of desire of David Smith to sell his sculpture? A. It was one of his main topics of conversation, was how much he wanted to sell. He liked to work on a huge scale, he liked to work all the time, he wanted materials, he wanted space, he wanted help in the welding, he was—there was a Paul Bunyan aspect to him that was constantly crippled by lack of liquidity. In fact, a few months before he died he asked me if in my opinion since I was also represented by Marlborough Gallery with a similar contract, if I thought the contract were breakable because he was doing so badly there.

Steven Weil, for Petitioners—Direct

(107) STEVEN WEIL, residing at 580 West 10th Avenue, New York, New York, the Administrator of the Whitney Museum of American Art, in New York City, and previously Vice-President and General Manager and one of the Directors of the Marlborough-Gerson Gallery in New York, called as a witness by the petitioners, having been first duly sworn, testified as follows:

* * *

Direct examination by Mr. Lowe:

* * *

(114) Q. What efforts did you make to sell the David Smith pieces since the inception of the contract in June 1963? A. I think we did what a gallery always does. We went out and we contacted people that we thought might be prospective purchasers to see if they were interested. We entertained any sign of interest, and if there was a sign of interest, to develop that interest whether it was in a specific piece or whether it was in a Smith piece generally. We showed the work outside from the time—there was a general Smith exhibition; we tried to get people to come in and see pieces by Smith. And I think it was the entire range of selling activities which characterizes any artist and any gallery

Q. During this period of time when you had this contract, did David Smith ever indicate to you that he disliked to sell his pieces? A. He indicated that he was for the most part—thought we were dragging our heels and doing a bum job selling his work.

Q. But in fact you were making every effort to sell his work? (115) A. The gallery earned its income by selling art work.

Q. And specifically, did you make every effort to sell his works? A. Yes, we did.

Steven Weil, for Petitioners—Direct

Q. Can you tell us what some of the difficulties were that you encountered in attempting to sell which resulted in your selling only five pieces in approximately eighteen months to two years prior to his death? A. Well, I think I would have to generalize first and say that the selling of sculpture is more difficult than the selling of paintings. There is a far greater market for painting than there is for sculpture. The selling of abstract sculpture such as Smith made is extremely difficult. There is simply far fewer people who are interested in abstract sculpture and have the means to buy it. And finally, in many many cases the scale of the work was so great that it could only be bought by people who had ample grounds around their house and could permanently install it, or by institutions which would have some way of dealing with it. These were often works that weighed many tons, ran—as far as the ones we showed at the gallery—ten to twelve feet high, and there were others that ran up to fifteen feet and more.

Q. When the contract was entered into between you and David Smith—and when I say you, I mean you as agent (116) for the gallery— A. I was not with the gallery. I was counsel to the gallery at that time.

Q. You were counsel for the gallery—was it contemplated; was it the expectation at that time that you would sell only eighteen pieces—excuse me—only five pieces in the next year and a half or two years? A. We certainly hoped to do a great deal better than that.

Q. Beg your pardon? A. We had hoped to do a great deal better than that.

Q. To your knowledge were any other pieces of sculpture sold during that period of time of David Smith by David Smith? A. I think the piece that is in Washington—we always refer to it as the Cafritz piece—but I think it belongs to a corporation which owns the building—it is one of the Cubi-series—was a sale which he had contracted

Steven Weil, for Petitioners—Direct

before he was with Marlborough. We knew about the sale. Whether the actual date of transfer of title or technical selling date was within the Marlborough period I don't know, but I believe that piece was delivered during the period while he was at Marlborough.

* * *

(152) Q. There was a good deal of testimony concerning the reputation of David Smith by witnesses of the respondent, or a witness for the respondent, and I wonder if you could comment on David Smith's reputation as an artist. A. Within the art world itself, among museum directors, among other artists, among highly knowledgeable collectors, David Smith had an immense reputation in his lifetime. I think he was virtually unknown to the man on the street. He was probably almost completely unknown, let us say even to average museum goers. But within the art world itself, his reputation was very, very great. And especially among his fellow artists.

Q. At the time of his death, do you know whether or not there were any museums in Europe that had any of his pieces? A. On the information I have, there were none.

* * *

(155) A. The market for sculpture is a far thinner one than the market for paintings.

Q. And you have already given a number of reasons. Do you have any others why the difference between sculpture and paintings and the demands of the two. A. Simply paintings have great portability, they are a traditional way of decorating homes, they are not only collected for the reasons Mr. Motherwell talked about yesterday, but they are a traditional part of decor. There is a market for that. People know how to handle them, what to do with them.

Steven Weil, for Petitioners—Cross

Sculpture is something that simply never has been that widespread in terms of use within homes. Collectors have come to sculpture only very recently. The market for sculpture in the United States has only been a major market largely since World War II. Sculptors as famous as Rodin have had their work selling for very, very little in New York right into the '40s, until a group of dealers who were interested in sculpture began to promote sculpture in New York.

* * *

Cross-examination by Mr. Reeves:

(162) Q. You were asked shortly after the death to appraise the inventory, is that right? A. I was asked at or about the time the form 706 return was due.

Q. Just briefly now, did you place a total value on it of \$714,000 for estate tax purposes? A. I am sorry, I did not. Because there are certain items in there which I did not appraise which I mentioned yesterday. They were items with which I was not familiar and which I was not able to see either the items or photographs. Virtually all of the work was appraised by me, but not to a total of \$714,000.

Q. How much do you appraise it? A. If you will let me see that, I can show you the items that I did not appraise.

(163) Q. This is a copy of Exhibit 3C, inventory of Mr. Smith's sculpture.

(Witness examining Exhibit)

A. I appraised all of it except the items which appear on pages 12 through 15, and have a total value of approximately \$45,000.

Q. The items that you appraised, you took the beginning figure, discounted it by 75 per cent and then took one-third away from that, and then came out to a final appraisal value. A. Yes.

Andre Emmerich, for Petitioners—Direct

Q. In other words, in the items that you appraised, if you take this \$3,000, Oranode (phonetic) of \$3,000, you started with a figure of \$18,000. A. I started on the assumption that Oranode were being offered for sale apart from the aggregate of the works, that the works were being offered and a purchaser was available, then in line with the prices which Smith had commanded to that time it could reasonably be expected that that purchaser would pay \$18,000 for it. Not a purchaser confronted with the availability all at one time in one place of 425 works. But someone who during Smith's lifetime would have sought out that work and sought to buy it.

I must emphasize that that's what that \$18,000 represents.

* * *

(181) ANDRE EMMERICH, the President of Andre Emmerich Gallery, called as a witness by the petitioners, having been first duly sworn, testified as follows:

Direct examination by Mr. Lowe:

* * *

(186) Q. I'd like to have you next tell us a little bit about marketing or what the market was for David Smith's work, not after he died, not before he died, but at the date of death, to the best of your ability. A. David Smith was a typical example of an artist who produced far more work than the market could absorb. The orderly market, the reasonable market, for an artist's work like David, as his sales record in fact indicates, is a few pieces a year. That's certainly true for virtually all the artists whom I represent.

Q. Is that up until his death? A. Up until his death, certainly. That's what we were reviewing. There was a sale of a limited number of pieces a year. A limited number of people who would each year buy or would come up

Andre Emmerich, for Petitioners—Direct

to buy a work. The big problem is how do you then value that huge bulk that David left, that certain other artists have left, when there were relatively few sales, leaving you to expect that the future sales would never be in (187) much bigger numbers.

Q. Would you— A. If you buy the estate in bulk, you have to expect to sell it off on a fairly slow basis. There aren't that many people to buy it.

Q. Was there any measure that you were able to use or one can use for that kind of an evaluation? A. The measure we came up with is the practical hard-headed one of what we individually, the members of the panel, would conceive as dealers of paying for the estate, for a bulk of sculptures.

Q. May I just interrupt for a moment, and ask you is there any real measure, or is it a speculative measure? A. It's highly speculative. There are a great many unknown, immeasurable factors involved.

Q. Could you tell us what some of those immeasurable factors are? A. What will happen to an artist's reputation in the market after he dies. Will the market for him go up? Will his critical reputation stand up or will the critical reputation decline? For example, a sculptor comes to mind named Mary Callery. Mary Callery was a contemporary of David Smith, was represented by Knoedler, was an extremely successful artist all her life, sold for high prices a lot of work. But since her death—

(188) The Court: What was her name?

The Witness: Mary Callery, C-a-l-l-e-r-y.

Since then I believe her market has virtually disappeared. It was a market in part based on her personality, on her social standing, on her circle of friends, and it disappeared with her death. Mary Callery's work as opposed to David Smith, David Smith's work after his death has gone up in value. Mary Callery's has gone down.

Andre Emmerich, for Petitioners—Direct

These are often unpredictable factors. The gambles that you take. You don't know what's going to happen.

Q. Mr. Emmerich, what is your opinion about the feasibility of having an auction shortly after the date of death of all the estate. A. That would of course be sheer disaster. You had four hundred and some pieces, there weren't four hundred and some buyers for Smith.

Q. May I just interrupt you and say based on facts that have been elucidated at this hearing, there were somewhere around seventy-five or eighty pieces sold during Smith's lifetime, can you give us an estimate, all we're doing here anyway is estimating, how many purchasers there may or may not be at such an auction. A. That's a very difficult guess. My hunch would be—

Q. You need not give a figure. Would it be very few or very large? (189) A. Very few, but mostly, in my opinion, it would have fetched much, much less than twenty-five per cent at auction. I don't think at auction it would have reached anything like twenty-five per cent of retail value.

Q. What would you have contemplated happening at an auction when the first piece came up and who do you believe would have been the first bidder, or the first purchaser? A. That's very difficult. If all the work had come up at auction, I suspect that there would have been no interest at all, or virtually no interest at all, in his early work. It would have gone for \$10, \$20, \$50 apiece. I think there would have been a certain interest in his late work, the so-called Cubi's for example, which would have fetched a few thousand dollars apiece. But that's a very theoretical question. But if there had been such an auction I think that is what would have happened. That there would have been \$10, \$25, \$50 for the early work and a couple of thousand each for the late ones.

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Thomas E. Norton, for Petitioners—Direct

(211) THOMAS E. NORTON, 311 East 72nd Street, New York, New York, called as a witness by the petitioners, having been duly sworn, testified as follows:

Direct examination by Mr. Lowe:

Q. Mr. Norton, could you tell us where you are presently (212) employed? A. At the Parke Bernet Galleries in New York.

Q. How long have you been so employed? A. Since 1956.

Q. What are the Parke Bernet Galleries? A. Parke Bernet Galleries is a firm of auctioneers and we also do appraisals, and it's affiliated with and in fact owned by the firm of Sotheby and Company in London who are also auctioneers.

Q. You say affiliated with, you handle all the United States auctions and Sotheby handles all the European auctions, is that correct? A. Yes.

The Court: S-o-t-h-e-b-y?

The Witness: That's right.

The Court: That's pronounced Sotheby?

The Witness: Yes, sir.

The Court: British pronunciation? Authentic looking. Go ahead.

Q. Is that the world's number one largest gallery—firm of auctioneers? A. Yes.

Q. How long have you been working for this firm of auctioneers? A. Since 1956. That's 14 years except for time in (213) the Army.

Q. And what is your title with that firm? A. I'm vice president of Parke Bernet, and a director of Sotheby.

Q. What is your particular field of endeavor within the firm? A. In general paintings and modern sculpture, but more especially American paintings and sculpture.

Thomas E. Norton, for Petitioners—Direct

Q. Have you had a good deal of experience in setting up auctions? A. Yes, I have.

Q. Could you very briefly tell us just the mechanics of setting up an auction? A. A single object or a group of objects would be inspected by us and appraised, that is for their marketability, and then the, you might say the wheels begin to turn and a catalog is published, the things are exhibited and then sold at auction.

Q. Do you have on occasion many requests that you feel are not subject to auctioning and that you refuse?

A. Yes. Not everything lends itself to a successful auction sale.

Q. Have you had any recent experience in connection with that? A. Every day it happens, in my day to day work. I (214) would just like to say that in general, auctions are most successful in terms of money, shall we say, when the object in question, object or objects in question, are in short supply and there is a big demand for them. And as the supply increases and/or the demand decreases the chances for a successful auction sale are diminished.

Q. This is a judgment that you are called upon to give almost everyday. A. Yes.

Q. Did there come a time very recently when you were requested to put up a number of drawings and water colors at auction? A. This happens from time to time. About a year or more ago, for example, we were asked to consider the possibility of auctioning water colors by Jackson Pollack.

Q. How many were there? A. There were about 80.

Q. And Jackson Pollack is a famous contemporary artist who just died about ten years ago, fifteen years ago. A. That's right.

Q. Did you in fact accept that offer to have those 80 pieces auctioned off? A. No. The owner who had received

Thomas E. Norton, for Petitioners—Direct

them directly from Pollack many, many years ago, felt that they were quite valuable, and we, as auctioneers, did not feel that we would (215) have been able to achieve the, you might say the total value that he had in his mind.

Q. Why was that? What was the basic reason that you felt you couldn't achieve that value? A. Well, my feeling was then, and it still is, that would be too many to put on the market at one time.

Q. Let me ask you this. If the executors of the estate of David Smith came to you in 1965, shortly after David Smith's death, and asked you if you would be willing to auction off the pieces left by the decedent, what would you have replied? A. I would have had to say in all honesty that I did not advise such a move. That it would be not in the best interests of the estate.

Q. And if they asked you why, what would you tell them? A. That there would be too many things offered at once and that it would tend to depress the market for many, many years to come.

Q. If you were told by them that there were 75 or 80 pieces sold during David Smith's lifetime, would that have any effect on your answer? A. Not by itself. But if I were told how many he had made in his lifetime and he had sold proportionately very few I would think that there was not very much of a wide demand for his work.

(216) Q. Didn't you have some background or some experience in knowing David Smith's work, generally speaking. A. Generally speaking, yes. We had sold a few and I had seen some on exhibition in New York.

Q. Over a period of the history of the Parke Bernet Gallery, do you know how many did go through the gallery in auction, approximately? A. About 5.

Q. Aside from your firm, is there any other firm of auctioneers who would be an alternate firm for the sale of this particular group of items? A. There are firms of

Thomas E. Norton, for Petitioners—Direct

auctioneers in almost every city but in general they do not have the facilities that we do, nor the following that we do, and there is really moderately none that is comparable.

Q. From a physical point of view, would you have any problems if you did go ahead and have such an auction?

A. The number of sculptures involved, and the size of so many would certainly have presented you might say logistical problems. We wouldn't have even been able to show them in the right way in our Madison Avenue Galleries.

Q. Would you be able to get them into your galleries, all the pieces? A. Not all.

Q. How much can you get in at one time? (217) A. I'm not familiar with the dimensions of all of them, but probably only a fraction of them at one time.

Q. Are there facilities to handle sculpture over 7 or 8 feet high? A. Not really, no. They cannot be afforded the full exhibiting technique that a more manageable size objects are afforded.

Q. Based on your experience in this field, what is your opinion as to the feeling that would be engendered upon the potential purchasers of such an announced auction?

A. In my experience, it would tend to create a climate of mistrust about the work of David Smith's sculptures. It would tend to imply to potential buyers that his estate, his family and the gallery with which he was associated had not much interest any more in him or in his works.

Q. What effect in your opinion do you feel that would have on an auction? A. I think it would have a depressing effect. Because part of the reason that people buy both through a gallery or at auction, it's an expression of their belief in the work of that artist. And if those who were most closely associated with the artist were implying a lack of confidence, then I think that would transmit it to potential buyers.

Thomas E. Norton, for Petitioners—Direct

Q. At such a fictitious auction, what do you think would happen with the first few pieces that came up for sale? (218) A. Well—

Q. I'll put it another way. Do you think that any potential buyer, knowing the factors that you just gave us, would pay a substantial price for the first piece or two that came up? Knowing that there were 423 more? A. I think there would be a tendency to wait and see what happens. In other words, let the other guy bid and let him set the price, and of course, if this is universal, there is a rather poor start to the auction.

Q. Under those conditions, how do you think the auction would end, if it started poorly? A. As I've said, I don't think the auction in general would be a success and the end and beginning would just be reflections of the whole thing. I don't think that people would be interested in buying unless they could get them very, very cheaply.

Q. In your answers and in the opinions that you are giving, are you making a distinction between abstract and representational work, for example? A. I haven't made the distinction. Because virtually the same rules apply. Supply and demand. But with abstract art, there is in general less demand. It's the more sophisticated thing that appeals to a smaller circle of people. Therefore, abstract works, or sculpture, anything that tends to make it a little more difficult, would tend to decrease (219) the demand for that work.

Q. I believe you have precipitated my next question, but I will ask it.

Do you in your answers consider the difference between sculpture and paintings? A. Yes.

Q. And how does that affect your decision? A. Sculpture is less universally collected, so therefore, there is less of a demand.

Q. Then are you also considering the question of size? A. Yes. That's the most important.

Thomas E. Norton, for Petitioners—Direct

Q. What does that connote to you? A. Easily portable things, attractive easy to live with things, you might say, are the things that would tend to sell best. Large monumental sculptures are just about the last thing that most people want. It's a special situation.

Q. And are you also considering the number of pieces?
A. Yes.

Q. And does that play a prominent part in your decision? A. Yes.

Q. What decision then would you finally arrive at—I'll strike that—I think I've asked it, I don't want to prolong it any longer.

I have no further questions.

(220) The Court: Before your cross-examination, can I, while I think of it, ask this witness a few irrelevant and immaterial questions?

Mr. Reeves: Absolutely, Your Honor.

The Court: I think I see a publication, an annual publication, is it not by Sotheby with regard to the report on their acquisitions and dispositions and collections?

The Witness: Yes, sir.

The Court: And also there is a British magazine called Apollo which deals with art matters.

The Witness: Yes, sir.

The Court: I don't remember seeing in any publication by Sotheby or any issue of Apollo magazine, a reference to an auction dealing with non-representational sculpture in the sub-classification of steel welding non-representational sculpture. Has there been in Sotheby, and you are a director, I understand, in the last ten years been an auction dealing with that type of non-representational sculpture.

The Witness: No, sir. There have been occasional pieces, usually small, that have been included

Clement Greenberg, for Petitioners—Direct

in sales with other kinds of sculpture, representational sculpture, so we have sold some. But as far as I can recollect, there has not been a sale composed totally of that (221) non-representational sculpture.

* * *

(227) CLEMENT GREENBERG, of New York City, an art critic, a writer, and an executor of the Estate of David Smith, called as a witness by the petitioners, having been first duly sworn, testified as follows:

Direct examination by Mr. Lowe:

* * *

(229) Q. Did you personally know David Smith? A. I made his acquaintance in 1944, and kept more or less in touch with him to the date of his death.

Q. Was this a constant, continuous friendship, would you say, until his death? A. Yes.

Q. Did he in fact name you as one of the executors in the estate? A. Obviously.

The Court: Who were the executors?

Mr. Lowe: The executors were Mr. Robert Motherwell, who testified, Mr. Clement Greenberg, and myself.

Q. Mr. Greenberg, in your discussions with David Smith during his lifetime, and because of your friendship with him, did he discuss with you his work on a personal basis? A. Yes.

Q. Can you tell us, and we are going to have the benefit of that personal relationship, could you tell us what his attitude was with regard to sales of his work? (230) A. It was a complaining and resentful attitude.

Clement Greenberg, for Petitioners—Direct

Q. What did he complain of and what was he resentful against? A. He complained about lack of sales and he was resentful because of what he thought was lack of recognition.

Q. Was this something that was just in a particular period, was it constant, or— A. It was constant.

Q. Was it constant up until he died? A. Until the day he died—well, no, I hadn't seen him for a couple of months before he died.

Q. To your knowledge, based on your experience with him, had he ever indicated to you that he did not want to make any sales? A. No. Except in one instance. He pointed to a piece that's been mentioned already, Australia, and said that was one piece he would prefer to retain and leave to his daughters.

Q. But in fact did he sell that piece? A. So I gathered from the one who bought it.

Q. That he did. A. Yes. Professor Rubin, I might say, extracted it from him.

Q. Aside from that piece, I believe you said that was the only one you know of. A. That's right.

(231) Q. And he was a prolific artist. A. Yes, indeed.

Q. Did he ever complain to you, besides the lack of sales, about the lack of anything else? A. The lack of money.

Q. Are you able, and I ask this more as a rhetorical question, are you able to discuss his reputation as of the date of his death, May 23rd, 1965? A. Up to the date of his death, you mean?

Q. Yes. A. Yes. It was deceptive. In some ways the fate of his reputation was like Jackson Pollack's. Pollack was famous let's say six-seven years before his death, but the fame was more like notoriety than fame. And it seemed not to affect Pollack's sales. Until about two years before Pollack's death and for a period of about four years be-

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fore—starting six years before his death and until about two years before, Pollack lived on advances from a collector named Alphonso Assoreo.

David was known to the art world but his art met a lot of resistance. And contrary to what some witnesses have testified, there were fellow artists who did not like his work, and the just-mentioned Pollack was one of them. The late Rothko, DeKooning, the late Hoffman, Phillip Gustin, I can go on, I can name museum directors, like James Johnson (232) Sweeney, Gordon Washburn, at that time director of Carnegie, Dorothy Miller, curator of modern art at the Museum of Modern Art, and still others whose names I've forgotten.

Mr. Reeves: Your Honor, I object to this.

The Court: He is talking about the man's reputation.

Mr. Reeves: How does he know that these people—

Mr. Lowe: That was to be my next question.

The Court: He's referring to people that he says are prominent in the art world, and I'm taking it for granted that they are, and giving what they have said as their evidence of the chap's reputation.

Mr. Lowe: I will be happy to ask that very question. (To Witness) How did you know?

A. Direct conversation, for the most part. And to some extent hearsay. Of course, some of it had to be hearsay.

The Court: Hearsay is reputation.

Q. But in any case, the persons that you mentioned, you knew personally? A. That's right. I knew every one of them.

Clement Greenberg, for Petitioners—Direct

Q. So you did discuss David Smith's reputation with each and every one of them at some time— A. As far as the artists named was concerned, yes.

The Court: What was that? So far as the artists were concerned?

The Witness: It came out of direct conversation (233) with them. It wasn't hearsay. I learned their opinion of David Smith's art from their own mouths.

Q. What about the critics, the art critics, with regard to his reputation up to the time of his death? A. Considerable opposition thereto. From John Kennedy in the Times, from Aline Saarinen who had preceded Kennedy on the Times as the chief art critic. From others, but let me say I remember because of their fewness those who were for David. And it was notably Hilton Kramer and Sidney Geist. Both of them were in Art Digest at that time.

Q. Does a high reputation equate itself with a high ability of financial success? A. Obviously not. I've just spoken of two cases, Pollack and Smith—

Q. Would you say this would apply in many, many cases? A. In many cases, no, not in many, many.

Q. Well, in one many—

The Court: In one many.

The Witness: That's right.

Q. Did there come a time when you were called upon to make an evaluation of the pieces left by David Smith? A. Yes. As executor.

Q. Did you have a great deal of thought and discussion concerning this? A. Yes.

(234) Q. As a result of this and conferences with the co-executors, did you come up with a determination as to

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what you thought should be used in reporting to the Internal Revenue Service? A. Yes. The process was this. I had a slight—when I learned I was one of the executors, I had, I won't call it a feeling of panic, but a feeling that Oh, Lord, and then I was told we were to evaluate the works left behind on the assumption that they were all to be sold within a reasonable length of time, which I undertook to mean a year. And I thought, Oh, Lord, we won't get a nickel on the dollar. And then I said, well, of course, if we reported that the valuation will be questioned, so let's lean over backward and make it the equivalent of fifteen or one-sixth of the retail price.

And I felt, if you care to know my feeling, that I was leaning over far backward.

Q. Did you at that time take into consideration or consult with Andre Emmerich, and also get somewhat the same feeling? A. Yes, I did. Because I didn't know the art market well enough. I knew David's market from what he had told me, from what I had heard. I didn't know the art market in general well enough. So I had to consult other people.

Q. You have read Steven Weil's affidavit, have you (235) not, at some point? A. Yes.

Q. In your evaluation of about one-sixth of the fictitious retail price, did you yourself and your co-executors consider commissions to Marlborough? A. No. We considered only what the estate would receive.

Q. It is true, is it not, that a similar total figure was arrived at by Steven Weil? A. That's right.

Q. But with a different method, using a one-third commission. A. Yes.

Q. And did you decide that since the resulting figures were similar that that is what would be put in for IRS purposes. A. Yes.

Q. And not necessarily being bound by the method Mr. Steven Weil used? A. Yes.

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Q. I want to ask you, Mr. Greenberg, about market for David Smith's work at time of death. I'm not talking now about what you decided for IRS purposes to use as a valuation, but for your opinion as to market under the concept of fair market values at date of death. What was the market then? (236) A. I couldn't see any.

Q. Do you have any reason to believe as a result of your being executor for five years, or co-executor for five years, and your close dealings with Marlborough Gallery as a co-executor— A. I wouldn't call them close dealings. I would call them something else. Intermittent dealings.

Q. Contacts with Marlborough Galleries, that there was anything to indicate to you that Marlborough Galleries did not make every effort to create and fulfill the market prior to David Smith's death? A. I had no evidence that Marlborough did anything but the best within the limits of the situation.

Q. As a matter of fact, subsequent to the termination of the contract, which had three years to run at the time of death, was that contract in substantially the same terms renewed? A. Yes.

Q. At any time after David Smith's death, and of course after you were known to be a co-executor, were you approached by anyone with regard to a discussion or a question about the possible purchase of a great number or the bulk of David Smith's work. A. No.

Q. To your knowledge—let me rephrase that.

(237) Did Mr. Steven Weil, who was with Marlborough Gallery and handling the sales, at any time come to you and ask you to comment on any requests that he received in that nature? A. No.

Q. Do you have knowledge that any of your co-executors or from any other source, that there were any overtures of any kind to buy the Smith estate in bulk? A. I have no such knowledge.

Clement Greenberg, for Petitioners—Direct

Q. Did the question of presenting the bulk estate at auction come to your mind? A. Not for one moment.

Q. What is the reason for that? A. It would have been a disaster.

Q. Why do you say that? A. Because I saw no market at prices that would have been above a dime on the dollar at the most. As I said I thought it would be a nickel on the dollar.

Q. Could you give us some reason why, in your opinion, subsequent to David Smith's death, on a number of pieces that the prices were in fact substantial? A. Let me say in the first place that the art boom began to accelerate just about in '65. That was a factor. And then inflation was another factor. Perhaps the most important was that David's death put period to a career and insensibly almost, not quite consciously, people became aware, (238) a minority of people, I'm not talking about many, became aware of the fact that a considerable artist had died, leaving behind a body of work. One didn't know how much, but you had that feeling, period, it's all over.

And in the case of a controversial artist, that often works to his benefit. Because during his lifetime, Smith's reputation had been controversial.

Now, it happens very often, for reasons I don't think I want to bore the Court with, that the death of a controversial artist tips the scale the other way. It happened with Cezanne, and so forth.

Q. When you talk about reputation, you said in a limited area. Could you confine that area where David Smith's reputation was really an issue? A. The art world. Let's say a few collectors, most museum directors and curators, fellow sculptors or painters, preponderantly in New York.

Q. And when you say art world, you don't mean in the world, you mean confined to the United States, and par-

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ticularly New York. A. To the art world—I was trying to describe the art world. He was known to fellow sculptors and art critics in England, and certain specialists in sculpture and certain museum directors or curators who specialized in contemporary sculpture abroad, on the continent, and that was about it.

* * *

(245) Cross-examination by Mr. Reeves:

Q. You mentioned that there were a number of critics and artists who did not think Mr. Smith was a great sculptor. A. Right.

Q. How many other American sculptors were invited to Spoleto, Italy, in 1962 when he went? A. I don't remember exactly, but—

Q. Do you recall any? A. I don't remember the names of the artists and suppose I don't? So what?

Q. Have you ever known another sculptor to be appointed to the National Council of Art? A. No. But these—can I expatiate a little here?

These honors are very deceptive, because they don't influence your sales capacity, and Mr. Motherwell who testified yesterday is an example of that. With all the honors, and he's been on that Council, and all that, Mr. Motherwell's works do not sell all that well. Not in any proportion to his reputation. That's art or the art world.

Q. You said that Mr. Smith was controversial. A. Indeed he was.

Q. Aren't most artists controversial? A. No. That's curious. In 1955, William DeKooning was not controversial. No one wrote adversely about his art. At this moment Frank Stella is not controversial. No one writes adversely about his art. At this moment Alexander Calder is (246) not controversial. Another sculptor, older con-

Clement Greenberg, for Petitioners—Cross

temporary of David's. No one writes adversely about his art. Henry Moore, the English sculptor. There are artists who are with the tide. Rothko is another example, the late Mark Rothko. No one wrote in criticism of his art.

On the other hand, Pollack, Smith, Morris Lewis who comes from Washington, were controversial artists and to some extent you can say, curiously or not, remain controversial.

Q. Do you agree that at the time of his death, Mr. Smith was one of the world's greatest sculptors? A. He did not have that reputation. I thought so, but he did not have that reputation.

* * *

**Findings of Fact and Opinion of Tax Court,
Together With Concurring and Dissenting
Opinions, February 23, 1972**

TANNENWALD, Judge: Respondent determined a deficiency of \$2,444,629.17 in the Federal estate tax of the Estate of David Smith (hereinafter referred to as Smith or decedent).

Several issues raised in the petition have been either resolved by agreement of the parties or abandoned by petitioner. The following issues remain for decision: (1) The fair market value of 425 sculptures created by Smith and in his possession at the time of his death; and (2) the deductibility of certain commissions incurred and paid by petitioner in the course of selling some of the aforementioned sculptures.

FINDINGS OF FACT

Some of the facts have been stipulated and, together with the exhibits attached thereto, are incorporated herein by this reference.

David Smith died from injuries sustained in an automobile accident on May 23, 1965. He was a citizen of the United States and a resident of Bolton Landing, N.Y., at the time of his death. Robert Motherwell, Clement Greenberg, and Ira M. Lowe qualified as coexecutors of the decedent's estate. A Federal estate tax return was filed on August 24, 1966, with the district director of internal revenue in Albany, N.Y.; the property included therein was valued as of the date of decedent's death. A deficiency was agreed upon and paid on July 10, 1968. On August 7, 1969, respondent issued the notice of deficiency herein.

At his death, Smith owned 425 pieces of sculpture created during various periods of his life. Of these sculptures, 291 were located at Bolton Landing, N.Y.

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Smith began making metal sculptures in 1937. Most of his work is of the abstract, nonrepresentational variety and fashioned out of welded steel and other metals, a technique which Smith pioneered. The quality of Smith's sculptures varied according to the period in his life during which they were created. From 1940 to 1963, Smith was represented by two art galleries who endeavored to sell his works, albeit without much success. Between 1940 and 1956, Smith was represented by the Willard Gallery, during which time 53 of his works were sold for \$33,432.50 at prices ranging from \$40 to \$3,213. From 1957 until 1963, he was represented by the Otto Gerson Gallery, during which time 17 pieces were sold for \$76,148.

On or about June 2, 1963, Smith and Marlborough-Gerson Galleries (Marlborough) entered into an agreement which provided in part as follows:

The following shall constitute our agreement with respect to the sale by us of sculpture, drawings and graphics created by you (hereinafter referred to as "your work"):

1. During the period of 5 years commencing on the date hereof, we shall have the exclusive right, in any part of the world, to offer for sale and to authorize others to offer for sale all items of your work owned by you. You shall initially deliver each such item of your work to us at such location as we shall indicate.

2. During such period of 5 years, we shall also have the exclusive right to arrange and to authorize others to arrange the publication and/or sale, in any part of the world, of books and catalogues containing illustrated reproductions of your work.

3. During such period of 5 years, we shall arrange for exhibitions of your work in New York,

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London, Rome and such other places as you and we shall jointly determine. We shall be responsible for all of the expenses of such exhibitions (including advertising and catalogue costs) other than insurance and shall bear the entire cost of storing all items of your work delivered to us pursuant to this agreement.

4. You have furnished us with photographs of each item of your work owned by you on the date hereof. The price at which we shall offer each such item for sale shall not be less than the price set forth on the back of such photograph. We shall agree with you as to the minimum sale prices of those items of your work created in the future. Minimum prices may be changed from time to time in such manner as you and we shall jointly agree.

* * *

6. Upon the sale by us of any item of your work, we shall reimburse ourselves from the actual net proceeds for any initial shipping cost and insurance cost advanced to you with respect to such item. In addition, as compensation for our services, we shall retain $\frac{1}{3}$ rd of the balance of such net proceeds. The remaining $\frac{2}{3}$ rds of such balance, less any amounts due to us hereunder, shall be paid to you in United States dollars on a quarterly basis.

* * *

8. This agreement shall be construed in accordance with the laws of the State of New York and shall be binding upon and inure to the benefit of your and our respective executors, administrators, successors and assigns.

This contract was renewed by Smith's estate on June 3, 1968.

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Smith's sculptures were mostly sold at retail to museums and individual collectors during his lifetime.

Between June 2, 1963, and Smith's death on May 23, 1965, Marlborough's efforts (which included an exhibition of 29 selected works at Marlborough's Gallery in New York in October of 1964) resulted in the following sales:

Date	Pieces sold	Total sales price	Commissions	Artist
Nov. 20, 1963	1	\$ 6,000	\$ 2,000	\$ 4,000
June 29, 1964	1	14,000	4,666	9,334
Nov. 12, 1964	1	40,000	13,333	26,667
Nov. 14, 1964	1	8,500	2,833	5,667
Jan. 7, 1965	1	40,000	13,333	26,667

During the 2 years following Smith's death, Marlborough effected the following sales, presented below in summary fashion:

Period	Number of works sold	Total sales price	Commissions	Artist
5/23/65-5/23/66 ..	16	\$269,383.00	\$ 89,795	\$179,588.00
5/24/66-5/31/67 ..	52	718,951.67	240,264	478,687.67

During his lifetime and at the time of his death, several factors militated against Smith's becoming a commercially successful artist. First, abstract sculptures attract far fewer buyers than do paintings, partly because the latter more easily fit into the decor of a buyer's household or of a museum. While Smith received mixed critical acclaim from his contemporaries and art critics, his work was not particularly appealing to the general public upon whom an artist must rely for the great bulk of his sales. Secondly, the size of his works (particularly those of the "Cubi" series, his most highly regarded series of sculptures), required a prospective buyer to have a great deal of space

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available for installation in order to properly exhibit them. Indeed, 185 of the 425 works in Smith's possession at his death were over 7 feet tall and comprised 80 percent of the total retail selling prices estimated by Smith's executors. Finally, Smith's works were priced relatively high, and it was generally acknowledged in the art world that the lowering of an artist's prices signified a lack of confidence in the quality of the work.

Towards the end of Smith's life, Smith began to receive critical recognition of his work and honors commensurate with his status as one of the leading American abstract sculptors. He was appointed to the National Council of Art in 1964, the first such artist to receive this honor; he also participated in the 1962 Festival of Two Worlds in Spoleto, Italy, a guest of the Italian Government and American composer, Gian Carlo Menotti, as well as being awarded a major prize at the 1959 Sao Paulo Biennial of Modern Art. Upon his death, several national magazines which had hitherto ignored Smith noted his contribution to American art, catapulting him into national prominence.

Smith was a prolific sculptor and constantly created a larger number of sculptures than the market could readily absorb. He customarily produced series of between 10 and 30 sculptures which were similar in appearance, technique, and scale. The most prized of Smith's works were those of the "Cubi" series, which consisted of 28 or 29 works of welded, polished steel cubes ranging from 7 feet to 9 feet in height and being offered for sale for between \$35,000 and \$50,000. Smith's sculptures generally tended to be large and consequently expensive to transport and to warehouse.

At the time of Smith's death and for an undetermined period thereafter, the general public was not aware of how many of Smith's works were in his possession at the time of his death. Had the public been aware of this fact, and

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had all 425 pieces been made immediately available for sale, the estate and Marlborough could reasonably have expected to get substantially less money for them than if the works were slowly disseminated in the market over a period of years. It was also important to "hold back" certain works for sale at a future date (particularly the more desirable of Smith's works) in order to sustain interest in his works over the 10-year period of time envisioned by the estate as necessary to liquidate Smith's works.

In valuing the works of art included in the return, the executors first computed the price each piece would bring if sold individually at retail at the time of death, the total hypothetical price being \$4,284,000. Then they discounted this figure by 75 percent on the theory that these works could only be sold at the time of death to a bulk purchaser for resale, and then reduced this figure by one-third to cover Marlborough's commission. The resulting figure of \$714,000 was reported as the date-of-death value of the sculptures.

The terms of decedent's last will anent the administration both of the estate and of the testamentary trust for the benefit of decedent's two minor daughters provide, in part, as follows:

THIRD: My Executors and Trustees shall take possession of my estate and are hereby given power to hold, manage, operate, control, sell, convey, lease, mortgage, encumber, renew encumbrances, and assign the said estate, or any part thereof, to collect all the rents, income and profits therefrom; to pay all taxes, insurance charges, necessary repairs and other proper expenses connected therewith; and with full power to sell and convey, from time to time, and to mortgage and encumber such parts of my property and estate, real or personal, including all of my works of art, as in their best judgment and discretion may

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be expedient. The proceeds derived from any such sale or sales shall be invested and reinvested from time to time in such securities and property, real or personal, as my Trustees may elect.

In the disposal of my works of art and other property, real and personal, said Trustees shall have as full and unlimited power and discretion as if said trust property were their own absolute estate.

The coexecutors have not yet filed a final accounting of the estate with the New York Surrogate's Court having jurisdiction of the administration of the estate. Their most recent intermediate accounting embraced a period ending on April 30, 1970. In the accountings, an aggregate of \$1,187,144.67 representing commissions paid to Marlborough was allowed by the Surrogate's Court.

From May 23, 1965, through April 30, 1970, the estate was required to pay \$789,970.38 for various administration expenses, debts of the decedent, and taxes, of which amount \$390,481.20 is allowable as a deduction under section 2053. At the time of decedent's death, total cash available to the estate from sources other than the sale of sculptures amounted to \$210,647.08. \$868,984.95 worth of sculptures were sold through Marlborough to cover the difference between the expenses enumerated above and ready cash, or \$579,323.30. Commission expenses of \$289,661.65 were incurred in respect of such sales.

In addition to the aforementioned expenses, the executors paid \$55,937.75 to the decedent's widow for the support of the two minor children. The executors have also made payments totaling \$1,392,491.69 to the trusts created under decedent's will for the benefit of the aforementioned children. While petitioner has claimed a deduction for all commission expenses incurred, respondent has disallowed any deduction for commission expenses in excess of \$289,661.65.

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ULTIMATE FINDING OF FACT

The fair market value of the 425 sculptures at the time of Smith's death was \$2,700,000.

OPINION

David Smith, a sculptor, died possessed of 425 pieces of non-representational metal sculptures created by his own efforts. The sculptures were valued at \$714,000 in the estate tax return. Respondent, in his deficiency notice, determined that they should be valued at \$5,256,918 but now concedes that they should be valued at not more than \$4,284,000. It is this issue of valuation, together with a related question involving the deductibility of certain expenses, which the parties have placed before us for decision. We approach the task with considerable circumspection, recognizing that this case involves a highly unusual set of circumstances to which the usual, simplistic valuation approach may not be fully applicable and that, in the final analysis, our ultimate determination of value will necessarily constitute a "Solomon-like pronouncement." See *Morris M. Messing*, 48 T.C. 502, 512 (1967).

Initially, we are faced with certain broad assertions by petitioner, which attack this proceeding in its entirety. First, it argues that the number and nature of the sculptures, coupled with the limited scope and vagaries of the market in which they might be disposed of, make valuation as of the date of death impossible. Consequently, it argues that we should determine a zero value and that any other determination of value would be a violation of its constitutional rights.¹ We find this argument to be without merit. Valuation has been consistently recognized as an inherently

1. Petitioner claims the benefit of the "equal protection" doctrine, the freedom-of-expression principle embodied in the first amendment, and the due-process clause of the fifth amendment.

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imprecise process. See *Morris M. Messing, supra*. Difficulties encountered in determining value, e.g., the presence of a limited market or other restrictive elements, have never been considered a bar to accomplishment of that task, much less to have acquired a constitutional significance, although such elements are factors to be taken into account.² *Publisher v. Commissioner*, 206 F. 2d 250 (C.A. 3, 1953); see also *George P. Fisher, Executor*, 3 B.T.A. 679 (1926). Moreover, the record herein shows clearly that the sculptures had value at the date of Smith's death, so petitioner's assertion that they had a zero value is factually baseless.

Petitioner next contends that the process by which respondent arrived at the valuation determined in his deficiency notice was "without foundation, unreasonable and arbitrary." This argument we also reject as without merit. Even if we were to decide that respondent's determination was erroneous, neither that consequence, nor the fact that respondent has reduced his claimed valuation from that set forth in the deficiency notice, constitutes sufficient grounds for disregarding the deficiency notice or relieving petitioner of its burden of proof. *Jacob D. Farber*, 43 T.C. 407, 428-429 (1965). Nothing in this record permits the conclusion that respondent's action was so utterly unjustified as to fall within the ambit of *Helvering v. Taylor*, 293 U.S. 507 (1935). Moreover, it is well established that—at least where unconstitutional conduct is not involved—the courts will not inquire into the administrative policies and procedures employed by respondent prior to making his determination. *Arthur Figueiredo*, 54 T.C. 1508 (1970).

Finally, petitioner contends that payment of a prior proposed deficiency was tantamount to a closing agreement and should preclude respondent from asserting any further

2. In an estate tax case, unlike an income tax case, there is an overriding necessity to determine a value. See *Burnet v. Logan*, 283 U.S. 404 (1931); Simpson, J., dissenting, in *Stephen H. Dorsey*, 49 T.C. 606, 634-635 (1968).

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deficiency. This argument must also be rejected. There is no evidence that the requirements that a closing agreement be in writing and signed by the Secretary of the Treasury or his delegate have been met. Sec. 7121; sec. 301.7121-1, *Proced. & Admin. Regs.* Mere payment of an asserted deficiency does not satisfy those requirements. *Payson v. Commissioner*, 166 F. 2d 1008 (C.A. 2, 1948); cf. *Helen Rich Findlay*, 39 T.C. 580, 588-589 (1962), affirmed in part and reversed in part on other issues 332 F. 2d 620 (C.A. 2, 1964).

We now turn our attention to the critical issue in this case—the determination of the fair market value of the sculptures at the time of Smith's death. In the final analysis, this is essentially a question of fact. *Daniel S. McGuire*, 44 T.C. 801, 812 (1965). As we view the record herein, petitioner does not complain about the mathematical result of respondent's calculation of value, if it is determined that respondent accorded appropriate weight to the various elements involved. Indeed, the value attached by respondent to each piece of sculpture, if it had been sold separately, is identical with the value established by petitioner on the same basis. Where they part company is with respect to the weight to be accorded to the fact that each item would be sold on a market on which 424 other items would simultaneously be available. Respondent claims that such simultaneous availability would have no adverse impact and that the fair market value of each item should simply be determined by the price at which the item could be separately sold in the retail art market on a "one-at-a-time" basis in accordance with the provisions of section 20.2031-1(b), *Estate Tax Regs.*³ Petitioner asserts that

3. Sec. 20.2031-1(b). *Valuation of property in general.* The value of every item of property includible in a decedent's gross estate under sections 2031 through 2044 is its fair market value at the time of the decedent's death, except that if the executor elects the alternate

(footnote continued on next page)

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this is totally unrealistic in this case; that the problem must be viewed in the context of what could be obtained if all 425 sculptures were offered for sale at the moment of death; that any purchaser under these circumstances could only be a person or syndicate acquiring the bulk of the sculptures for resale; that such person would be required to make a large cash investment which could be recouped with an acceptable profit only over a long period of time;

valuation method under section 2032, it is the fair market value thereof at the date, and with the adjustments, prescribed in that section. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. The fair market value of a particular item of property includible in the decedent's gross estate is not to be determined by a forced sale price. Nor is the fair market value of an item of property to be determined by the sale price of the item in a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate. Thus, in the case of an item of property includible in the decedent's gross estate, which is generally obtained by the public in the retail market, the fair market value of such an item of property is the price at which the item or a comparable item would be sold at retail. * * * The value is generally to be determined by ascertaining as a basis the fair market value as of the applicable valuation date of each unit of property. For example, in the case of shares of stock or bonds, such unit of property is generally a share of stock or a bond. Livestock, farm machinery, harvested and growing crops must generally be itemized and the value of each item separately returned. Property shall not be returned at the value at which it is assessed for local tax purposes unless that value represents the fair market value as of the applicable valuation date. *All relevant facts and elements of value as of the applicable valuation date shall be considered in every case.* The value of items of property which were held by the decedent for sale in the course of a business generally should be reflected in the value of the business. * * * [Emphasis added.]

This regulation was amended to read as above on June 7, 1965, a date subsequent to Smith's death. See T.D. 6826, 1965-2 C.B. 367. Both parties have dealt with this case on the basis of the amended language nevertheless being applicable, and we have no reason to question this approach. See sec. 7805(b). Moreover, our ultimate decision as to the proper valuation would be the same, whichever regulation were applied.

Findings of Fact and Opinion of Tax Court

and that such person would pay only 25 percent of the separate "one-at-a-time" value which, after a further discounting by one-third to take into account the effect of the contract with Marlborough, results in a valuation of \$714,000.

We find it unnecessary, in this unusual case, to make any hard-and-fast choice between the two approaches urged by the parties.⁴ On the one hand, we think that the initial 75-percent discount, which petitioner has applied to the "one-at-a-time" value in order to determine the price which a purchaser would pay for all the sculptures, is too high. On the other hand, we think that respondent should have given considerable weight to the fact that each item of sculpture would not be offered in isolation. We think that, at the very least, each willing buyer in the retail art market would take into account, in determining the price he would be willing to pay for any given item, the fact that 424 other items were being offered for sale at the same time. The impact of such simultaneous availability of an extremely large number of items of the same general category is a significant circumstance which should be taken into account.⁵ In this connection, the so-called blockage rule utilized in connection with the sale of a large number of securities furnishes a useful analogy. See *Maytag v. Commissioner*, 187 F. 2d 962, 965 (C.A. 10, 1951), affirming a Memorandum Opinion of this Court; *Helvering v. Maytag*,

4. For a discussion of some of the difficulties involved in applying respondent's regulations on a broad-brush basis, see "Federal Estate and Gift Taxation: Amended Regulations Change Valuation for Estate and Gift Taxes," 1966 Duke L. J. 248 *et seq.*; Report of the Committee on Estate and Gift Taxes, 19 Bull. A.B.A. Taxation Section, No. 4, p. 71 (July 1966).

5. See sec. 20.2031-1(b), Estate Tax Regs. fn. 3 *supra*: "All relevant facts and elements of value as of the applicable valuation date shall be considered in every case." (Emphasis added.) Compare *Bankers Trust Co. v. United States*, 284 F. 2d 537 (C.A. 2, 1960); *Old Kent Bank & Trust Co. v. United States*, 292 F. Supp. 48 (W.D. Mich. 1968).

Findings of Fact and Opinion of Tax Court

125 F. 2d 55, 63 (C.A. 8, 1942), affirming a Memorandum Opinion of this Court; *Helvering v. Safe Deposit & Trust Co. of Baltimore*, 95 F. 2d 806, 811-812 (C.A. 4, 1938), affirming 35 B.T.A. 259 (1937); *Estate of Robert Hosken Damon*, 49 T.C. 108, 117 (1967). We think that a museum or individual collector of art objects would not completely ignore the resale value of a given item, although it obviously has far less significance than in the case of a dealer. Moreover, the "retail market" claimed by respondent may well encompass the use of an auction method of disposal (to be distinguished from the usual forced-sale concept) for at least a part of the art objects;⁶ in such a situation the presence of a large number of pieces on the market at one time would be a most material factor. Under the foregoing circumstances, we think that, in this case, the amount which an *en bloc* purchaser for resale would pay and the aggregate of the separate "one-at-a-time" values to be obtained by a variety of dispositions in the "retail market" would be the same.

We have taken into account certain other elements involved in the valuation process as they existed at the moment of death. These include⁷ the fact that Smith's reputation as a sculptor had not fully blossomed; the relatively low level of acceptability of nonrepresentational sculpture in the market place; the distribution of the 425 items according to size, period in Smith's life during which they were created, and their expression, in relative terms, of the quality of Smith's work; Smith's tendency to work in series

6. We note that art objects are frequently disposed of by way of auction (to be distinguished from a forced-sale auction) and that estimates of prices to be obtained by a sale of such objects in this fashion are of some significance. See *Eugene P. Mathias*, 50 T.C. 994, 999 (1968).

7. In listing such elements, we do not mean to imply that we have set forth every consideration which has influenced our decision herein.

Findings of Fact and Opinion of Tax Court

and whether or not a given item was part of a complete series owned by Smith at his death; the number of sales by Smith (or his agents) in the 25 years before his death and the prices at which sales were made during the period immediately preceding and following death;⁸ the fact that the bulk of the items was located at Bolton Landing, N.Y., which was relatively inaccessible, and that a large number of the items could not have been readily transported to a location more accessible to potential buyers.⁹

One element of value which petitioner urges be taken into account relates to its obligation to Marlborough by virtue of the exclusive agency contract which Smith made and which survived his death. Petitioner insists that any value based upon the gross sales price must be reduced by one-third to take into account the commissions to which Marlborough was entitled. We think any reduction in value with respect to this element is precluded by the decided cases. In *Publicker v. Commissioner, supra*, the court refused to permit the price which could be realized on the sale of a piece of jewelry to be reduced by the Federal excise tax which would have been payable. Cf. also *Estate of Frank Miller Gould*, 14 T.C. 414 (1950).¹⁰ The measure of value laid down by these cases is what could be *received* on, not what is *retained* from, a hypothetical sale. Even if

8. Provided they are not too far removed from the critical date, sales before and after such date may be used to corroborate the ultimate determination of value. In this case, we have given little weight to sales taking place more than 2 years after Smith's death. See *Fitts' Estate v. Commissioner*, 237 F. 2d 729, 731 (C.A. 8, 1956), affirming a Memorandum Opinion of this Court; *James Couzens*, 11 B.T.A. 1040, 1165 (1928); cf. sec. 20.2031-2(b), Estate Tax Regs.

9. Compare sec. 20.2031-1(b), Estate Tax Regs., fn. 3 *supra*, which recognized the propriety of "taking into account the location of the item."

10. While both *Publicker* and *Gould* are gift tax cases, the provisions relating to value in the gift and estate tax areas have been held to be *in pari materia*. *Merrill v. Fahs*, 324 U.S. 308, 311-313 (1945).

Findings of Fact and Opinion of Tax Court

one may question the equating of "price" with the gross price including tax, in situations involving the excise tax, it cannot be gainsaid that the "price" herein is what a purchaser would pay for a piece of sculpture. Cases such as *Estate of Albert L. Salt*, 17 T.C. 92 (1951), relied upon by petitioner, are not in point. Concededly, they limit the value of property subject to a restrictive agreement, but they, too, look to what the estate of the decedent can obtain, not to the net it will retain when the property is sold. Nor does an examination of the contractual relationship between Smith and Marlborough reveal sufficient elements to construct a joint venture which might have given Marlborough an interest in the sculptures themselves with a consequent effect on the value at death (cf. *Raum, J.*, concurring, in *Harry C. Porter, Transferee*, 49 T.C. 207, 227 (1967))—an effect which we might add could have favorable as well as unfavorable aspects to a taxpayer in the valuation process.

Having carefully considered the entire record herein, we conclude that the fair market value of the 425 sculptures at the moment of Smith's death was \$2,700,000.

We now address ourselves to the remaining issue in the case, namely, the extent to which the commissions to which Marlborough was entitled are deductible as administration expenses under section 2053(a).¹¹

11. SEC. 2053. EXPENSES, INDEBTEDNESS, AND TAXES

(a) GENERAL RULE.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—

- (1) for funeral expenses,
- (2) for administration expenses,
- (3) for claims against the estate, and
- (4) for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,

as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

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The argument of the parties essentially focuses on section 20.2053-3(d), Estate Tax Regs., which provides in pertinent part as follows:

(d) *Miscellaneous administration expenses.*

* * *

(2) Expenses for selling property of the estate are deductible if the sale is necessary in order to pay the decedent's debts, expenses of administration, or taxes, to preserve the estate, or to effect distribution. The phrase "expenses for selling property" includes brokerage fees and other expenses attending the sale, * * *

This regulation has been in effect in substantially the above form since 1919 and its restrictive language was sustained in *Estate of Christine Swayne*, 43 T.C. 190, 201-202 (1964). Compare *Ballance v. United States*, 347 F. 2d 419, 423 (C.A. 7, 1965).

The respondent concedes that, to the extent that the sculptures had to be sold to pay taxes, debts, etc., commissions attributable to such sales are deductible. Petitioner argues that additional Marlborough commissions¹² are deductible on the ground that they were incurred to preserve the estate and/or they were incurred in order to effect distribution of the estate. We think petitioner's claim must be rejected. *Estate of Christine Swayne, supra.*

12. It is not clear to us the precise extent to which petitioner claims deductibility—i.e., whether it would limit its claim to those commissions actually revealed by this record as having been paid or whether it would anticipate that a favorable decision on our part would entitle it to keep the question of tax liability open until the estate had made its last sale and paid the applicable commissions to Marlborough, an event which has apparently not yet taken place. In view of our disposition of the issue at hand, we find it unnecessary to seek clarity on this point.

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The mere fact that the commissions claimed by petitioner herein to be deductible were allowed by the New York Surrogate's Court is not sufficient. The clause "as are allowable by the laws of the jurisdiction * * * under which the estate is being administered," contained in section 2053(a), establishes a threshold and not an exclusive condition; the requirements of respondent's regulations must also be satisfied. *Pitner v. United States*, 388 F. 2d 651, 659-660 (C.A. 5, 1967); *Estate of Christine Swayne, supra*. Compare *Estate of James G. Todd, Jr.*, 57 T.C. 288 (1971), where we held that the claimed expense had both been allowed by the Probate Court and was necessarily incurred to preserve the estate. Compare also *Dauphin Deposit Trust Co. v. McGinnes*, 208 F. Supp. 228, 237-238 (M.D. Pa. 1962), affirmed on another issue 324 F. 2d 458 (C.A. 3, 1963), and *In Re Bartlett's Estate*, 153 F. Supp. 674, 678 (E.D. Pa. 1957), both of which rested on a presumption of "necessity" under Pennsylvania law.

Clearly, there was no necessity under the will to sell the sculptures beyond the point necessary to discharge funeral and administration expenses and claims. Indeed, the will itself contemplated a distribution of the sculptures in kind to the trusts for the benefit of Smith's daughters. Smith was under no obligation to support his daughters after his death nor were his executors under any such obligation. *In Re Garcy's Trust*, 19 App. Div. 2d 811, 243 N.Y.S. 2d 464 (1st Dept. 1963). The trust was the vehicle for support and, if cash were necessary for that purpose, the trustees, not the executors, were the ones required to make the decision to sell and it is they who would have incurred the concomitant obligation to pay Marlborough its commission. To the extent that the executors made decisions to sell in order to provide support money, they were acting on behalf of the trust and not on behalf of the estate. Cf. *Sharpe's Estate v. Commissioner*, 148 F. 2d 179, 181 (C.A. 3, 1945).

We are not impressed with petitioner's argument that, because of the volatile nature of the art market, it was nec-

Findings of Fact and Opinion of Tax Court

essary in order to "preserve the estate" to accept any reasonable offer which may have been made. Such a general thesis applies in almost every estate situation and the area of discretion vested in the executors is very broad indeed. In fact, the schedule of actual sales and the increasing prices the executors were able to obtain indicate that haste might well have made waste. Certainly, there is nothing in the record to justify analogizing the sculptures to perishable goods, which by their very nature have to be sold promptly, or with an unexpectedly serious development which sometimes may make sales the sine qua non of preserving the estate.

The regulations appear to be directed toward safeguarding the integrity of the estate tax by making certain that administration expenses which are properly deductible will normally be limited to those which could be anticipated as being necessarily incurred and paid during the period of administration. To allow the commissions to the extent claimed by the petitioner herein would seriously undermine the achievement of that sound objective.¹³ Moreover, there can be no assurance that all or any specific number of art objects would in fact be sold with the result that the amount of commissions payable would, in any event, be highly speculative. Cf. *Estate of John B. Sharpe*, 3 T.C. 612, 626 (1944), affirmed sub nom. *Sharpe's Estate v. Commissioner*, 148 F. 2d 179 (C.A. 3, 1945).¹⁴

13. A similar result would obtain if deduction of commissions were allowed on the basis that they were claims against the estate, contingent and speculative at death but becoming a reality during the period of administration. Moreover, any such rationale might require an evaluation of the contract as an asset insofar as it enabled the estate to obtain Marlborough's services. Cf. *Commissioner v. Wragg*, 141 F. 2d 638 (C.A. 1, 1944); *Parrott v. Commissioner*, 30 F. 2d 792 (C.A. 9, 1929); compare *Estate of George Herbert Atkins*, 2 T.C. 332, 346-347 (1943).

14. We also note that the obligation to use Marlborough as a selling agent had only approximately 3 years to run at the time of Smith's death.

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We hold that petitioner's deduction under section 2053 is limited to amounts paid for administration expenses, debts, and taxes in the sum of \$390,481.20 plus \$289,661.65 representing commissions paid to Marlborough, without prejudice to petitioner's rights under Rule 51.¹⁵

Reviewed by the Court.

Decision will be entered under Rule 50.

TJETJENS, J., dissenting and concurring: This case was tried before Judge John W. Kern. Judge Kern died before he decided the case which then was assigned to me without objection.

I do not disagree on the valuation issue so far as the discussion of the legal principles to be applied is concerned. I would, however, give more weight to the actual sales prices of various pieces of statuary sold both before and after the sculptor's death as well as uncontested evidence of values placed on the separate pieces by both the respondent and petitioner if they had been sold separately. Accordingly I would find the fair market value of the 425 sculptures to be \$4,284,000.

On the remaining issue I concur.

GOFFE, J., concurring in part, dissenting in part: I concur with the majority of the Court as to the fair market value of the sculptures at the date of decedent's death but I must respectfully dissent on the issue of the extent of deductibility of selling commissions as administration expenses.

15. Since the amount of \$289,661.65 does not include an allowance for commissions on sales necessary to raise the funds with which to pay any estate taxes beyond those already paid, i.e., the additional estate tax resulting from our decision herein, a further deduction for such commissions and any other items encompassed within Rule 51 should be taken care of in the Rule 50 computation.

Findings of Fact and Opinion of Tax Court

Petitioner did not raise as an issue the possible invalidity of section 20.2053-3(d)(2), Estate Tax Regs. The opinion of the majority, however, determines that such section of the regulations is valid because of its age, its approval in *Estate of Christine Swayne, supra*, and because it is necessary in order to safeguard "the integrity of the estate tax by making certain that administration expenses which are properly deductible will normally be limited to those which could be anticipated as being necessarily incurred and paid during the period of administration."

I am constrained to dissent because I think it obvious that the section of the regulations is clearly outside the scope of the Code and contrary to the intent of Congress; the age of the section gives it no validity because it is contrary to the committee reports covering reenactment of the Code section; and because this Court did not pass upon the validity of the section in *Swayne*, but has, instead, ignored the application of the section in other cases, as have other courts.

Section 2053(a)(2) of the Internal Revenue Code of 1954 provides as follows:

SEC. 2053. EXPENSES, INDEBTEDNESS, AND TAXES.

(a) **GENERAL RULE.**—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—

- (1) for funeral expenses,
- (2) for administration expenses,
- (3) for claims against the estate, and
- (4) For unpaid mortgages on, or any indebtedness in respect of, property where the value of the

Findings of Fact and Opinion of Tax Court

decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,
as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

Section 20.2053-3(d)(2), Estate Tax Regs., provides as follows:

(d) *Miscellaneous administrative expenses.*

* * *

(2) Expenses for selling property of the estate are deductible if the sale is necessary in order to pay the decedent's debts, expenses of administration, or taxes, to preserve the estate, or to effect distribution. The phrase "expenses for selling property" includes brokerage fees and other expenses attending the sale,
* * *

It is apparent that the regulations impose a limitation upon the deductibility of selling expenses not prescribed by the Code, to wit, the sale giving rise to the expense must be necessary in order to pay the decedent's debts, expenses of administration, or taxes, to preserve the estate or to effect distribution. It is this limitation which the majority of the Court applies against the petitioner to reduce its deduction for selling expenses.

I am not unmindful of the principle of statutory reenactment upon which the majority apparently relies for its observation that the section 20.2053-3(d)(2) of the regulations has been in effect since 1919. The principle of statutory reenactment is a rule of statutory construction and must be indulged in to find that Congress, by enacting section 2053(a)(2) of the Internal Revenue Code of 1954,

Findings of Fact and Opinion of Tax Court

intended to incorporate therein section 81.35 of Regs. 105 (not materially different from section 20.2053-3(d)(2), Estate Tax Regs.). The committee reports for the Internal Revenue Code of 1954 reflect no consideration of section 81.35 of Regs. 105. House Report No. 1337 is as follows:

G. Expenses, indebtedness, and taxes (sec. 2053)

Funeral expenses, administration expenses, claims against the estate and unpaid mortgages are deductible in computing the taxable estate under present law. However, this deduction is limited to those expenses allowable by the laws of the jurisdiction under which the estate is being administered and cannot exceed the value of the property included in the gross estate subject to claims, that is, the probate estate. Thus, if the decedent has placed most of his assets in a trust (not includible in his probate estate) funeral and other expenses actually paid * * * out of the trust assets are not allowed as a deduction to the extent they exceed the value of the property in the probate estate.

These arbitrary distinctions have been removed under your committee's bill. Expenses incurred in connection with property subjected to the estate tax, although not in the probate estate, are to be allowed as deductions, if the expenses are of the type which would be allowed as deductions if the property were in the probate estate and they are actually paid within 1 year of the decedent's death.

In addition, expenses in connection with property subject to claims are to be allowed without regard to the total value of the probate estate if they are paid within the period provided for the assessment of the estate tax. [H. Rept. No. 1337, to accompany H.R. 8300 (Pub. L. No. 591), 83d

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Cong., 2d Sess., p. 91 (1954). S. Rept. No. 1622, to accompany H.R. 8300 (Pub. L. No. 591), 83d Cong., 2d Sess., pp. 124-125 (1954).]

The lack of indication that Congress considered the regulations brings the matter into precisely the holding of the Supreme Court in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), where the Court stated at page 431 of its opinion:

Re-enactment—particularly without the slightest affirmative indication that Congress ever had the *Highland Farms* decision before it—is an unreliable indicium at best.

I submit that Congress considered only the limitation of State law in enacting section 2053(a)(2) of the Internal Revenue Code of 1954 as the report quoted above obviously demonstrates.

The majority feels that the limitation imposed only by the regulations is necessary to safeguard the integrity of the estate tax. Congress apparently did not feel such a safeguard was necessary. Congress provided that deductions for selling expenses were allowable if permitted under State law. That is the sole limitation provided by Congress in the statute and reflected in the committee reports. If additional safeguards are needed they should come from Congress, not from the Secretary or his delegate in the form of unauthorized regulations. In my opinion the integrity of the estate tax must be safeguarded from unauthorized and unwarranted limitations imposed by regulations as well as abuses which may occur elsewhere.

The majority indicates that section 20.2053-3(d)(2), Estate Tax Regs., has been sustained by this Court in *Estate of Christine Swayne, supra*. Nothing in that opinion indicates that the validity of the regulations was chal-

Findings of Fact and Opinion of Tax Court

lenged. The Court did not state that the regulations were valid. In the instant case the validity of the regulations was not challenged but the majority of the Court undertakes to decide they are valid. The opinion in *Swayne* distinguishes *Estate of Louis Sternberger*, 18 T.C. 836, (1952), affd. 207 F. 2d 600 (C.A. 2, 1953), reversed on other grounds 348 U.S. 187 (1955).¹ It is distinguished on the ground that the Sternberger estate was being administered under the laws of New York rather than under the laws of Connecticut where the Swayne estate was being administered. The Court specifically found in Sternberger that the proceeds from the property sold which gave rise to the expenses deducted were not needed to pay debts or expenses but were allowable under New York law. I believe the *Sternberger* case is squarely in point and the majority opinion herein is incorrect where it says at pages 660-661 that:

The mere fact that the commissions claimed by petitioner herein to be deductible were allowed by the New York Surrogate's Court is not sufficient. The clause "as are allowable by the laws of the jurisdiction * * * under which the estate is being administered," contained in section 2053(a), establishes a threshold and not an exclusive condition; the requirements of respondent's regulations must also be satisfied. * * *

My position is supported by the opinion of the U.S. Court of Appeals for the Seventh Circuit in *Ballance v. United States*, 347 F. 2d 419 (C.A. 7, 1965). It may well be that in fulfilling the test of allowability under State law the taxpayer is also fulfilling a requirement of that section of the regulations which I find invalid. Be that as it may,

1. The issue of deductibility of selling expenses in *Sternberger* was not raised on appeal.

Findings of Fact and Opinion of Tax Court

the test is still State law. See *Dauphin Deposit Trust Co. v. McGinnes*, 208 F. Supp. 228 (M.D. Pa. 1962), affirmed on another issue 324 F. 2d 458 (C.A. 3, 1963), and *In Re Bartlett's Estate*, 153 F. Supp. 674 (E.D. Pa. 1957).

I believe this situation existed in our opinion in *Estate of James S. Todd, Jr.*, *supra*, cited by the majority; i.e., allowability under State law fulfilled the test set forth in the regulations. I see nothing in the *Todd* opinion, however, indicating that the validity of the regulations was in issue or necessarily determined to be valid.

For the foregoing reasons, I believe petitioner should be allowed to deduct all the selling expenses paid.

FORRESTER, DAWSON, and HOYT, *JJ.*, agree with this concurring and dissenting opinion.

WHITEY, *J.*, agrees only with respect to the dissent.

**Agreed Computation Under Rule 50,
January 11, 1974**
Respondent's Computation for Entry of Decision

UNITED STATES TAX COURT

Docket No. 4251-69

ESTATE OF DAVID SMITH,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

The attached computation is submitted, on behalf of the respondent, in compliance with the Court's opinion determining the issues in this case, together with a proposed decision which is being lodged concurrently with said computation.

This computation is submitted without prejudice to respondent's right to contest the correctness of the decision entered herein by the Court.

Jan 11 1974

/s/ MEADE WHITAKER—DWG
MEADE WHITAKER
Chief Counsel
Internal Revenue Service

Of Counsel:

ROBERT A. BRIDGES
Director,
Tax Court Litigation Division

ST. CLAIR REEVES
Attorney,
Internal Revenue Service

Agreed Computation Under Rule 50

Computation Statement

CC:TC:Tr:SR

In re: Estate of David Smith, Deceased,
Ira M. Lowe, Clement Greenberg,
Robert Motherwell, Co-Executors
2700 Que Street, N.W.
Washington, D.C.

Docket No. 4251-69

Date of Death: May 23, 1965

Estate Tax

Deficiency \$71,433.51

The petitioner may claim additional credit for State death tax in the amount of \$1,489.01 provided proof of such payment is presented to the Internal Revenue Service within the statutory period.


The details supporting the above computation are set forth on attached pages 1 to 4, inclusive.

Without prejudice to the right of appeal, it is agreed that the attached computation is in accordance with the opinion of the Tax Court in the above-entitled case.

/s/ IRA M. LOWE

IRA M. LOWE
Counsel for Petitioner

Details Supporting Computation

(See Opposite )

12873. 12/11/73 ESTATE TAX		STATEMENT SCHEDULE 1
ESTATE OF DAVID SMITH		DATE OF DEATH MAY 23, 1965
TAXABLE ESTATE AS SHOWN IN: <input type="checkbox"/> RETURN AS FILED <input type="checkbox"/> PRELIMINARY LETTER DATED <input checked="" type="checkbox"/> STATUTORY NOTICE DATED August 2, 1969		\$5,329,738.54
INCREASES (DECREASES) TO TAXABLE ESTATE (SEE ATTACHED EXPLANATION OF ITEMS) SCHEDULE F- MISCELLANEOUS PROPERTY SCHEDULES J & K- EXPENSES & DEBTS		(\$2,556,918.-) (\$1,692,524.59)
TAXABLE ESTATE AS REVISED		\$1,080,295.95
TAX COMPUTATION	GROSS ESTATE TAX	\$352,015.42
	CREDIT FOR STATE DEATH TAXES SUBSTANTIATED	39,889.93
	GROSS ESTATE TAX LESS CREDIT FOR STATE DEATH TAXES	\$312,125.49
	OTHER CREDITS	- 0 -
	ESTATE TAX LIABILITY	\$312,125.49
	ESTATE TAX ASSESSED	245,691.98
	DEFICIENCY (OVERASSESSMENT)	\$71,433.51
	LESS: ADDITIONAL CREDIT FOR STATE DEATH TAXES ALLOWABLE, IF SUBSTANTIATED	1,489.01
	DEFICIENCY (OVERASSESSMENT) AFTER STATE DEATH TAXES ALLOWABLE	\$69,944.50

12-10-73

FORM 886-A

(REV. APRIL 1968)

EXPLANATION OF ITEMS

SCHEDULE NO. OR
EXHIBIT

1A

NAME OF TAXPAYER

ESTATE OF DAVID SMITH

DATE OF DEATH:

MAY 23, 1965

SCHEDULE F- MISCELLANEOUS PROPERTY

PREVIOUSLY
DETERMINED

RECOMPUTED

ITEM 5

\$2,897.32

\$2,897.32

ITEM 9

5,256,918.-

2,700,000.-

DECREASE

(2,556,918.-)

TOTAL

\$2,707,897.32

\$2,707,897.32

ITEM 5- ADJUSTMENT PREVIOUSLY AGREED TO.

ITEM 9- ADJUSTMENT TO REFLECT VALUE AS

DETERMINED BY THE TAX COURT OF THE

UNITED STATES.

EXPLANATION OF ITEMS

EXHIBIT

1 B

NAME OF TAXPAYER

ESTATE OF DAVID SMITH

YEAR PERIOD ENDED

DATE OF DEATH:

MAY 23, 1965

PREVIOUSLY
DETERMINED

RECOMPUTED

SCHEDULES J & K - EXPENSES & DEBTS

TOTAL OF SCHEDULES J & K - DEBTS & EXPENSES TO

APRIL 30, 1970:

\$ 93,932.45

\$ 364,556.32

NEW ITEM (1) - ADMINISTRATION EXPENSES FROM

MAY 1, 1970, TO AUGUST 14, 1973

- 0 -

671,452.93

NEW ITEM (2) - SELLING COMMISSIONS PAID TO

MARLBOROUGH-GERSON TO APRIL 30, 1970:

- 0 -

289,661.65

NEW ITEM (3) - SELLING COMMISSIONS PAID TO

MARLBOROUGH-GERSON FROM MAY 1, 1970,

TO AUGUST 14, 1973.

- 0 -

410,012.52

NEW ITEM (4) - ADDITIONAL SELLING COMMISSIONS

TO MARLBOROUGH-GERSON TO RAISE

FUNDS TO PAY THE DEFICIENCIES DETER-

MINED BY THIS COMPUTATION. (SEE

EXHIBIT 1-C, ANNEXED)

- 0 -

50,773.52

INCREASE IN DEDUCTIONS:

1,692,524.59

TOTAL:

1,786,457.01

1,786,452.61

11/6/73

NAME OF TAXPAYER

ESTATE OF DAVID SMITH

YEAR/PERIOD ENDED

DATE OF DEATH
MAY 23, 1965

COMPUTATION OF ADDITIONAL SELLING COMMISSIONS

New Item (4)

The petitioner paid Marlborough - Benson a commission of $33\frac{1}{3}$ per cent on gross selling price. Therefore, for every \$3.00 sold, the Estate realized \$2.00.

TOTAL REQUIRED TO BE SOLD \$152,320.79

* DEFICIENCY DETERMINED BY THIS COMPUTATION: 101,547.22

COMMISSION: $33\frac{1}{3}\%$ OF \$152,320.79 50,773.57

TOTAL \$152,320.79

* DEFICIENCY DETERMINED BY THIS COMPUTATION:

FEDERAL ESTATE TAX PREVIOUSLY ASSESSED: \$245,691.98

NET FEDERAL ESTATE TAX AS RECOMPUTED

(AFTER ALL ALLOWABLE CREDITS) 315,636.48

DEFICIENCY OF FEDERAL ESTATE TAX \$69,944.56

NEW YORK ESTATE TAX PREVIOUSLY ASSESSED \$39,889.93

NEW YORK ESTATE TAX AS RECOMPUTED

(EQUAL TO MAXIMUM IRC 2011(B) CREDIT) 41,378.94

DEFICIENCY OF NEW YORK ESTATE TAX 1,489.01

TOTAL DEFICIENCY: \$71,433.51

ESTIMATED INTEREST ON DEFICIENCY OF FEDERAL TAX \$29,376.65

ESTIMATED INTEREST ON DEFICIENCY OF STATE TAX 737.06

TOTAL ESTIMATED INTEREST ON DEFICIENCY 30,113.71

TOTAL DEFICIENCY DETERMINED BY THIS COMPUTATION: \$101,547.22

99a

Decision Entered January 30, 1974

UNITED STATES TAX COURT

Docket No. 4251-69

ESTATE OF DAVID SMITH, ETC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Pursuant to the opinion of the Court filed February 23, 1972, and incorporating herein the facts recited in the respondent's computation as the findings of the Court it is

ORDERED and DECIDED: that there is a deficiency in estate tax due from the petitioner in the amount of \$71,433.51.

THEODORE TANNENWALD, JR.

Judge.

Entered: Jan 30 1974

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

/s/ IRA M. LOWE

IRA M. LOWE

Counsel for Petitioner

/s/ MEADE WHITAKER—DWG

MEADE WHITAKER

Chief Counsel

Internal Revenue Service

Notice of Appeal

UNITED STATES TAX COURT

Washington, D. C.

Docket No. 4251-69

ESTATE OF DAVID SMITH, DECEASED, IRA M. LOWE, CLEMENT
GREENBERG, ROBERT MOTHERWELL, Co-executors,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Notice is hereby given that petitioners, the Estate of David Smith, Deceased, Ira M. Lowe, Clement Greenberg, and Rober Motherwell, Co-executors, hereby appeal to the United States Court of Appeals for the Second Circuit from that part of the decision of this court entered in the above-captioned proceeding on the 30th day of January, 1974 relating to the limitation of the deduction under Section 2053 of the Internal Revenue Code of 1954 for commissions paid to the Marlborough-Gerson Galleries to less than the full amount of such commissions.

Dated: April 24, 1974

/s/ M. BERNARD AIDINOFF

M. Bernard Aidinoff

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